APPENDICES

APPENDIX A

SUPREME COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellees,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellants.
(Two Cases)

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants.

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees,

Argued Sept. 17, 1985

Decided May 6, 1986

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

LARSEN, Justice.*

On September 17, 1985, this Court heard oral argument in these three related appeals which arise from class action suits challenging the constitutionality of certain highway user fees and taxes imposed by the Com-

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* This case was reassigned to this writer on March 12, 1986.

monwealth of Pennsylvania upon interstate motor carriers whose vehicles travel upon Pennsylvania roads, highways and bridges. To place these constitutional challenges in proper perspective, it is necessary and beneficial to first provide an overview of the salient provisions of our Vehicle Code, 75 Pa.C.S.A. §§ 101-9910 and taxing statutes.

I

PENNSYLVANIA HIGHWAY USER FEES

A. OVERVIEW

Our General Assembly has enacted a comprehensive and highly complex system of highway user fees, charges and taxes (hereinafter referred to as "highway user fees") designed to partially reimburse the Commonwealth of Pennsylvania for expenditures made for maintenance, construction and restoration of our extensive system of interstate highways, roads and bridges, and for expenditures made for the administration and enforcement of our Vehicle Code which governs all aspects of the use of our highways (*e.g.*, safety, vehicle characteristics, registration and licensing, regulations concerning the operation of motor vehicles, etc.). Given that the Commonwealth of Pennsylvania is a major thruway for interstate commerce along the northeast corridor, and given its hilly terrain and frequently severe weather conditions which accelerate roadway and bridge deterioration in combination with heavy use by large tractors and trailers engaged in interstate commerce, these expenditures are, of course, enormous.

Pennsylvania's highway user fees include the following:

(a) truck and truck-tractor registration fees;

(b) trailer registration fees;

(c) truck and truck-tractor title fees;

(d) trailer title fees;

(e) registration transfer fees;

(f) special handling permit fees;

(g) special trip permit fees;

(h) Fuel Use Tax;

(i) Motor Carriers Road Tax;

(j) Oil Company Franchise Tax;

(k) Gross Receipts Tax (on vehicles traveling interstate);

(*l*) Liquid Fuels Tax;

(m) farm truck registration fees.[1]

As will be explained more fully, certain of these highway user fees (such as registration fees and titles) are "fixed" while others such as the Liquid Fuels Tax, the Fuel Use Tax and the Motor Carriers Road Tax, *see* note 1, *supra*) are related to and dependent upon a motor carrier vehicle's actual use of Pennsylvania highways. All of the various highway user fees are "credited to the Motor License Fund and expended exclusively for road-related purposes." Joint Stipulation of Facts (hereinafter "JSF") at No. 315 C.D. 1982, No. 11 M.D. Appeal Docket 1985, para. 64.

Owners of motor vehicles that are based in Pennsylvania must register those vehicles with the Department of Transportation and must pay the registration fee applicable to the particular type of vehicle. 75 Pa.C.S.A.

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[1] Joint Stipulation of Facts (hereinafter "JSF") at No. 315 C.D. 1982, No. 11 M.D. Appeal Docket 1985, paras. 64, 65-98. *See* the Vehicle Code, 75 Pa. C.S.A. Chapters 13 (Registration of Vehicles), 19 (Fees) and 95 (Taxes for Highway Maintenance and Construction), and the Fiscal Code, Pa. Stat. Ann. tit. 72, §§ 2611a-2611z (Tax on Liquid Fuels), §§ 2614.1-2614.24 (Fuel Use Tax), §§ 2617.1-2617.26 (Motor Carriers Road Tax).

Chapter 13 (Registration) and Chapter 19 B (Registration Fees). These registration fees are paid by owners of Pennsylvania-registered vehicles in addition to the other various highway user fees outlined above.

The complexity of a state's scheme for imposition and collection of highway user fees is greatly compounded by the very nature of the interstate highway system and its use by motor vehicles registered in all of the United States and foreign countries with each jurisdiction generally having its own registration fees and other taxes applicable to those vehicles. In light of this multiplicity of sovereign interests, the General Assembly has declared:

> It is the policy of this Commonwealth to promote and encourage the fullest possible use of its highway system by authorizing the making and execution of reciprocal agreements, arrangements and declarations with other states, provinces, territories and countries with respect to drivers, licensed and vehicles registered in this and other states, provinces, territories and countries, thus contributing to the economic and social development and growth of this Commonwealth.

75 Pa.C.S.A. § 6141, Declaration of policy. *See* 75 Pa. C.S.A. §§ 6141-6153, Chapter 61, subchapter C, (Reciprocity). The Secretary of the Department of Transportation is authorized to execute agreements or arrangements with other jurisdictions granting to "drivers or vehicles or owners of vehicles properly licensed or registered in those jurisdictions . . . benefits, privileges and exemptions from the payment . . . of any taxes, fees or other charges" imposed upon Pennsylvania drivers, vehicles and owners provided that "drivers or vehicles properly licensed or registered in this Commonwealth . . . shall receive exemptions, benefits and privileges of a similar kind or to a similar degree as are extended to drivers or vehicles properly licensed or registered in . . ." the other

jurisdiction. 75 Pa.C.S.A. § 6143. It is further provided in that section that:

> Each agreement or arrangement shall, in the judgment of the secretary, be in the best interest of this Commonwealth and the citizens thereof and shall be fair and equitable to this Commonwealth and the citizens thereof, and shall be determined on the basis and recognition of the benefits which accrue to the economy of this Commonwealth from the uninterrupted flow of commerce.

Prior to September, 1982, Pennsylvania had entered into bilateral Apportioned Registration Agreements with twenty-three states and provinces, which agreements were based upon the International Registration Plan (hereinafter the "IRP"). On September 15, 1982, Pennsylvania became a member jurisdiction of the IRP. Under both the former bilateral agreements and the IRP, registration fees for "apportionable vehicles" were/are determined: by dividing the in-jurisdiction miles by the total miles during the preceding year to produce a fraction; (2) by determining the total fee required under the laws of each jurisdiction for full registration of each vehicle; and (3) by multiplying the total fee for each state by the fraction of in-jurisdiction miles to total miles. JSF para. 102.[2] No state which is contiguous to Pennsylvania was an IRP member at times relevant to these appeals.

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[2] For example, assuming a motor carrier vehicle based in any IRP state traveled 50% of its miles in the Commonwealth, 40% in state A, and 10% in state B, and assuming the full registration fees for those states were $400, $300, and $200 respectively, the registration fees paid by that vehicle would be as follows (if states A and B are IRP-member jurisdictions):

To Pennsylvania:	50% × $400 =	$200
To state A:	40% × $300 =	$120
To state B:	10% × $200 =	$ 20
Total registration fee:		$340

JSF at para. 103.

B. THE MARKER DECAL FEE AND ACT 68

The Act of June 18, 1980, P.L. 229, No. (hereinafter Act 68) amended the Vehicle Code by adding chapter 21, Motor Carriers Road Tax Identification Markers, which operated in conjunction with the Motor Carriers Road Tax Act. 75 Pa.C.S.A. § 2101-2105, as amended. The latter Act, part of the Fiscal Code, taxes liquid fuels purchased outside the Commonwealth but consumed while traveling within it. 72 P.S. §§ 2617.1-2617.26. Act 68 requires every motor carrier vehicle[8] operating in Pennsylvania to display an identification marker to be issued by the Department of Revenue upon payment of a fee. Purchase of the identification marker decal notifies the Commonwealth that the motor carrier vehicle is subject to the Road Tax Act and triggers that Act's reporting, record-keeping and tax-paying requirements. Pennsylvania-registered motor carrier vehicles are not required to bear these marker decals because the act of registration notifies the Commonwealth that the vehicle is subject to the Road Tax Act and the Pennsylvania license plate provides the identification marker necessary to facilitate enforcement. § 2102(d)(1).

Act 68 further provided:

> 2102(b) Fee.—The fee for issuance of an identification marker shall be $25, except that for vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee.

This fee is a "tax for the privilege of using Pennsylvania roads." JSF para. 1. The administrative costs associated with the issuance of the marker decal are approximately $5.00; the balance of the marker fee is credited to the

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[8] Act 68 defined "motor carrier vehicle" as "A truck, truck tractor or combination having a gross weight or registered weight in excess of 17,000 pounds."

Motor License Fund and expended for road-related purposes such as highway maintenance, construction, state police operations and construction bond debt service. JSF paras. 4, 5 and 46.

Section 2 of Act 68 also simultaneously amended section 1916(a) of the Vehicle Code and increased registration fees for all Pennsylvania-registered motor carrier vehicles. The smallest registration fee increase was $45.00 (for Class 7 vehicles, or motor carrier vehicles with "gross or combination weight" of 17,000-21,000 pounds), graduating upward to $228.00 (for Class 20 vehicles, or motor carrier vehicles with "gross or combination weight" of 68,001-73,280 pounds). In every case, therefore, the registration fee increase exceeded the amount of the marker fee ($25.00).

Act 68 further provided that operation of a motor carrier vehicle in Pennsylvania without an identification marker was unlawful unless exempted by regulation or unless a five-day permit had been obtained for a $5.00 fee where enforcement of the identification marker decal provisions "would cause undue delay and hardship in the operation of such motor carrier vehicle or vehicles." 75 Pa.C.S.A. § 2102(d).

C. THE AXLE TAX AND ACT 234

The Act of December 8, 1982, P.L. 842, No. 234 (hereinafter "Act 234") added Chapter 99, Axle Tax for Highway Bridge Improvement, to the Vehicle Code. 75 Pa.C.S.A. § 9901-9910, as amended. Act 234 also amended section 2102(b) by reducing the marker fee to $5.00 as of March 31, 1983.[4] 75 Pa.C.S.A. § 2102(b).

Act 234 imposed an axle tax upon all motor carriers[5] as follows:

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[4] The $5.00 marker fee has not been challenged in these actions.

[5] Act 234 defines "motor carrier" as "Every person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth." 75 Pa. C.S.A. § 9901.

> In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of $36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the highways of this Commonwealth.

75 Pa.C.S.A. § 9902. This tax must be paid "at the time a motor carrier applies for vehicle registration or for the issuance of an identification marker or permit pursuant to section 2102. . . ." 75 Pa.C.S.A. § 9903. The full axle tax applies to all motor carrier vehicles, regardless of state or province of registration, which travel at least 2,000 miles annually in this Commonwealth; vehicles traveling less than 2,000 miles annually are entitled to a rebate prorated in accordance with the actual mileage.[6] 75 Pa.C.S.A. § 9905. Additionally, payment of the axle tax is excused if the motor carrier has obtained a 5 day trip permit for $25. 75 Pa.C.S.A. § 2102(d).

The Legislature has declared the purpose of the axle tax as follows:

> It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth. In order to reach this goal, firms with Pennsylvania-based facilities shall be actively solicited to make bids on contracts to furnish products and materials, including, but not limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.

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[6] The rebate is calculated in accordance with the following formula:

$$\frac{\text{2000 miles - actual miles traveled}}{\text{2000 miles}} \times \text{axle tax paid} = \text{rebate}$$

75 Pa.C.S.A. § 9907(b). To that end, all proceeds from the axle tax and trip permits are to be "deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund" and appropriated for expenditure on bridge rehabilitation, replacement and removal projects. 75 Pa.C.S.A. § 9907(a) and 9908.

Section 1 of Act 234 simultaneously amended section 1916(a) of the Vehicle Code and, beginning with the weight class upon which the axle tax is first imposed (26,001-30,000 pounds), reduced the annual Pennsylvania truck or truck tractor registration fees in multiples of $36.00. The practical operation of this simultaneous reduction in registration fees was explained by the Commonwealth Court:

> The incremental $36.00 registration fee reductions roughly correspond to the number of axles legally required for vehicles of various weights. Permissible maximum gross weights for two-axle, three-axle and four-axle trucks are 38,000 pounds, 58,400 pounds and 73,280 pounds, respectively. *See* 75 Pa.C.S. § 4941(c). Vehicles registered with maximum gross or combination weights of 26,001-40,000 pounds, 40,001-60,000 pounds, 60,001-73,280 pounds and 73,281-80,000 pounds, sustained registration fee reductions in amounts of $72.00, $108.00, $144.00 and $180.00, respectively. Registration fee reductions generally offset the tax owed based on the number of axles ordinarily required of vehicles within each affected weight class.[3]

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[3] The correspondence between registration fee reductions and the number of axles is not perfect. For example, trucks weighing between 38,001 and 40,000 pounds are required to have three axles, yet registration fees were reduced by $72.00 rather than $108.00

American Trucking Associations, Inc. v. Bloom, 87 Pa. Commw. 345, 487 A.2d 465, 467 & n. 3 (1985).

II

THE CLASS ACTION SUITS

A. AMERICAN TRUCKING I

No. 11 M.D.Appeal Docket 1985 (Appeal from Order of the Commonwealth Court entered at No. 315 C.D. 1982)

Appellees are American Trucking Associations, Inc. (ATA), a non-profit corporation/federation of 51 state trucking associations and 13 national conferences, and two non-Pennsylvania corporations engaged in the interstate motor carrier business. As plaintiffs below, appellees filed an original class action complaint with the Commonwealth Court seeking to have section 2102(b) of the Vehicle Code, the marker fee, declared unconstitutional. Appellees were certified to represent a class of plaintiffs consisting of all interstate motor carriers whose vehicles are registered outside of Pennsylvania and who are or will be subject to the identification marker and marker fee requirement imposed by Act 68. Appellants are James I. Scheiner, Secretary of the Department of Revenue, Leroy S. Zimmerman, Attorney General of the Commonwealth, and Jay Cochran, Commissioner of the Pennsylvania State Police.[7]

The complaint set forth the following challenges to the constitutionality of the marker fee: that it was discriminatory and unduly burdensome under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3; that it violated the Privileges and Immunities Clause, Art. VI, § 2; that it violated the Equal Protection Clause, amend. XIV and the Uniformity Clause of the Pennsylvania Constitution,

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[7] Appellant Scheiner succeeded Robert K. Bloom, an original defendant, as Secretary of Revenue during the pendancy of this action and was, therefore, substituted under Pa. R.A.P. Rule 502. Similarly, appellant Cochran replaced the late Daniel F. Dunn, an original defendant, as Commissioner of the Pennsylvania State Police.

Art. VIII, § 1; and that it violated the Supremacy Clause, Art. VI, cl. 2.[8] The gravamen of most of these allegations is discrimination perceived against interstate commerce in favor of local commerce in that, by "deeming" the marker fee to be part of and included in the Pennsylvania registration fee, Act 68 actually imposed the $25.00 marker fee "exclusively upon motor carrier vehicles registered outside of Pennsylvania for the privilege of using the highways of the Commonwealth." Complaint paras. 42, 50, 52, 61. The second principal contention was that Act 68 imposed an "unlawful burden" under the Commerce Clause upon interstate motor carriers because the marke[r] fee is a flat tax that is "wholly unrelated to the volume, value or nature of the services provided by the Commonwealth" and is "wholly unrelated to the magnitude or nature of any benefit received by or conferred upon" interstate motor carriers. Complaint para. 46.

Appellees' prayer for relief sought a declaration that section 2101(b) of the Vehicle Code (as originally enacted by Act 68) was unconstitutional and sought an injunction against its enforcement. Additionally, appellees sought immediate refund of "any $25.00 payments received from interstate motor carriers on account of marker fees for the year commencing April 1, 1982."[9]

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[8] Although the Commonwealth Court decided only the Commerce Clause issue in appellees' favor, appellees reiterate all of the remaining constitutional objections in their appeal before this Court, except for the Supremacy Clause argument. Accordingly, the Supremacy Clause challenge has been abandoned.

[9] Appellees were also certified to represent a subclass of plaintiffs in this class action at No. 315 C.D. 1982. This subclass consisted of all interstate motor carriers whose vehicles were registered in any of the states or provinces with which Pennsylvania had entered into bilateral Apportioned Registration Agreements and whose vehicles were or would be subject to the $25.00 marker fee. Count VII of the complaint asserted, alternatively, that this subclass was being discriminated against because payment of the marker fee by its members, who also paid an apportioned Pennsylvania registration fee that was "deemed" to include that marker fee, amounted to pay-

The parties filed an elaborate Joint Stipulation of Facts. Additionally, trial was held before the Honorable Robert W. Williams, Jr., under the original jurisdiction of the Commonwealth Court concerning the validity of appellees' survey which purported to establish the discriminatory impact of the marker fee upon foreign registered vehicles. The trial court held that the marker fee discriminated against such vehicles and in favor of Pennsylvania registered vehicles, declared section 2102(b) of the Vehicle Code unconstitutional under the Commerce Clause, and ordered refund of marker fee payments made after April 1, 1982 pursuant to stipulation of the parties regarding refunds. 77 Pa.Commw. 575, 466 A.2d 755 (1983). The amount of the refund would be approximately ten million dollars, payment of which has been deferred pending "final decision" of this matter, pursuant to stipulation.

Exceptions were taken to the trial court's order which the Commonwealth Court overruled *en banc*. 87 Pa. Commw. 345, 487 A.2d 468 (1985) (Opinion per Williams, J.; Crumlish, P.J. and Barry, J., dissenting). The Commonwealth Court viewed the issue as "whether the Legislature intended to, and actually did, incorporate the $25.00 marker fee when it increased Pennsylvania-based motor carrier vehicle registration fees under Act 68." *Id.* at 350, 487 A.2d at 470.

That court identified the appropriate standard of review of legislation alleged to be violative of the Commerce Clause:

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ment in excess of the $25.00 marker fee. Refund of the excess was demanded. In April, 1982, the Department of Transportation announced that, because Pennsylvania registration fees were deemed to include the $25.00 marker fee, $25.00 was to be subtracted from the registration fees before they were apportioned. Refunds were ordered and have been made by the Commonwealth of the amounts in excess of $25.00 erroneously received from members of this subclass prior to April, 1982. Accordingly, Count VII of the complaint has been rendered moot and is not an issue in this appeal.

> Local taxation of interstate commerce does not violate the Commerce Clause when the levy (1) is applied to an activity with a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce and (4) is fairly related to local services. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). A state tax's validity under the Commerce Clause must be measured by the statute's actual effect on interstate commerce in the context of the state's entire, interrelated taxing scheme. *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981) (Louisiana's "first-use" tax on natural gas invalidated because local users benefited by a series of exemptions and credits).

Id. at 350, 487 A.2d at 471.[10] Nevertheless, the Commonwealth Court focused on legislative history preceding the adoption of Act 68 and "divine[d] a legislative intent to exempt Pennsylvania-registered motor carrier vehicles from payment of the $25.00 marker fee." *Id.*[11] Accord-

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[10] The parties agree that the validity of the highway user fees challenged in these appeals under thhe Commerce Clause is governed by the four-part test enunciated by the United States Supreme Court in *Complete Auto.*

[11] That court's "divination" of the discriminatory legislative intent was based upon the following analysis:

> Act 68's precursor, Senate Bill No. 10 (Printer's No. 965), significantly raised motor carrier vehicle registration fees, without including a marker fee provision, when first reported from Transportation Committee on June 25, 1979. On July 10, 1979, a $5.00 identification marker decal provision was added to Senate Bill No. 10 (Printer's No. 1038). When the $25.00 marker fee was subsequently introduced in Senate Bill No. 10 (Printer's No. 1834), which was reported from Conference Committee on May 27, 1980, the motor carrier vehicle registration fees were never increased to reflect the newly added privilege tax. Moreover, the registration cost for vehicles weighing between 68,001 to 78,280 prounds was reduced by $41.00. Since

ingly, the Commonwealth Court affirmed the trial court's finding that section 2102(b) of the Vehicle Code "facially offends the third prong of the *Complete Auto* standard which proscribes discrimination against interstate commerce," *id.* and did not address appellees' remaining exceptions.

Appellants then filed this direct appeal from a final order of the Commonwealth Court in a matter originally commenced therein. 42 Pa. C.S.A. § 723(a).

B. AMERICAN TRUCKING II

No. 12 M.D.Appeal Docket (Appeal from Order of the Commonwealth Court entered at No. 267 C.D. 1983)

Appellees in this action are ATA and four different non-Pennsylvania corporations engaged in the interstate motor carrier business. As plaintiffs below, appellees filed an original class action complaint with the Commonwealth Court seeking to have section 9902 of the Vehicle Code, the axle tax, declared unconstitutional. Appellees were certified to represent a class of plaintiffs consisting of all interstate motor carriers who own vehicles registered outside of Pennsylvania who are or will be subject to the axle tax, as well as a subclass of plaintiffs consisting of such interstate motor carriers who are registered in any of the states or provinces that are not members of the International Registration Plan. Appellants are the same public officials named as defendants in *American Trucking I* who are charged with the duty to administer and enforce the challenged legislation. (*See* note 7, *supra* and accompanying text). The axle tax was challenged as violative of: the Commerce Clause as discriminating

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the Legislature never increased registration fees in response to the subsequent $25.00 marker levy, we *divine a legislative intent to exempt Pennsylvania-registered motor carriers from payment* of the $25.00 marker fee. (emphasis added).

against and unduly burdensome to interstate commerce; the Privileges and Immunities Clause; the Equal Protection Clause; and the Uniformity Clause of the Pennsylvania Constitution. As in *American Trucking I*, the gravamen of most of these allegations is discrimination. Appellees have asserted throughout these proceedings that the imposition of the $36 per axle tax upon all motor carrier vehicles, accompanied by Act 234's simultaneous reduction in the Pennsylvania registration fees almost exactly offsetting the amount of the axle tax for Pennsylvania registered vehicles, was facially and actually discriminatory and imposed the full burden of the axle tax upon non-Pennsylvania registered interstate motor carriers. Complaint paras. 42, 43, 50, 52, 56. Appellees' second principal contention was that Act 234 imposed an "unlawful burden" upon interstate motor carriers because the axle tax is a flat tax that is unrelated to the "volume, value or nature of the services provided by the Commonwealth" and is "wholly unrelated to the magnitude or nature of any benefit received by or conferred upon" interstate motor carriers. Complaint par. 46.

Appellees' prayer for relief sought a declaration that section 9902 of the Vehicle Code (Act 234) was unconstitutional and sought an injunction against its enforcement. Appellees also sought "repayment of all sums already collected by defendants pursuant to the Axle Tax forthwith together with interest."

Appellants filed an Answer and New Matter asserting that the axle tax is imposed equally upon all interstate motor carrier vehicles whether registered in Pennsylvania or outside of Pennsylvania. While the appellants conceded that the reduction in Pennsylvania registration fees equaled the amount of the axle tax in most cases, and substantially offset the amount of the axle tax in the other cases, they denied that Act 234 or the axle tax discriminated against non-Pennsylvania registered interstate motor carriers or that it placed an unlawful burden

upon interstate commerce. The crux of appellants' defense is and has been that Act 234, imposing the axle tax while reducing Pennsylvania registration fees, "effects a rational restructuring of Pennsylvania's highway user charges" which increased the burden borne by those interstate motor carriers who had been least burdened before, *i.e.*, those carriers who did not pay Pennsylvania's substantial (higher than the national average) registration fees. Thus, appellants argue that Act 234 does not discriminate against appellees and that, in fact, "local commerce" (Pennsylvania registered interstate motor carriers) bears more of the burden of Pennsylvania's highway user fees than does "interstate commerce" (non-Pennsylvania registered interstate motor carriers).

Both sides filed extensive affidavits of fact regarding expenditures of funds received by imposition of the axle tax, the impact of that tax upon various categories of highway users, etc. Although some of the factual assertions were disputed, both sides filed cross-motions for summary judgment. The Commonwealth Court *en banc* granted appellees' motion for summary judgment, denied appellants' motion, declared section 9902 of the Vehicle Code unconstitutional under the Commerce Clause, and ordered refunding of axle tax payments made by affected class members after April 1, 1983 in accordance with stipulations reached by the parties concerning refunds. 87 Pa.Commw. 379, 487 A.2d 465, 468 (1985) (per Williams, J.; Crumlish, P.J., and Barry, J. dissenting). That court held:

> Commerce Clause jurisprudence distinguishes between two types of legislation: (1) protectionist measures that are infused with discriminatory purpose or effect and (2) facially neutral acts that regulate evenhandedly to promote legitimate local interests, with incidental effects on interstate commerce. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475

(1978). Economic protectionist legislation is subject to a "virtually per se rule of invalidity," while a facially neutral measure is invalidated whenever burdens on interstate commerce clearly outweigh putative local benefits. *Id.*

* * * *

Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).

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Id. at 382, 487 A.2d at 467.

Given this disposition, the Commonwealth Court did not address appellees' other constitutional arguments. Appellants then filed this direct appeal with this Court. Payment of this refund has been stayed pending the outcome of this appeal.

C. AMERICAN TRUCKING III

No. 19 M.D.Appeal Docket (Appeal from Order of the Commonwealth Court entered at No. 160 C.D. 1984).

The appellants/plaintiffs in this class action suit are ATA and the same non-Pennsylvania corporations which are appellees/plaintiffs in *American Trucking I*. Appellees are the same Commonwealth officials who are appel-

lants/defendants in *American Trucking I and II*. Appellants herein inform us that this action is "identical in all respects" to *American Trucking I*, except for the time period for which refunds are sought. This "present action seeks only that relief which was inadvertently not requested in the prior action, the refund of taxes paid in the first two years of the operation of the (marker fee) tax, *i.e.*, August 18, 1980 to March 31, 1982." Brief for Appellants at 4.

The Commonwealth Court granted appellees' preliminary objections and held that it did not have jurisdiction over the case because appellants did not initially seek refunds from the Board of Finance and Revenue under section 503 of the Fiscal Code, 72 P.S. § 503, and hence, had failed to exhaust their administrative remedies. 87 Pa.Commw. 418, 489 A.2d 269 (1985). Appellants then filed this direct appeal, and all three appeals were consolidated for oral argument.

III

THE COMMERCE CLAUSE

The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 provides that the United States "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States. . . ." The "basic purpose of the Clause" is to "prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S.Ct. 2114, 2133. 68 L.Ed.2d 576 (1981), *quoting Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977). From this basic purpose stems one of the fundamental principles of Commerce Clause jurisprudence, an antidiscrimination principle. *Id.* This principle is that no state, consistent with the Commerce Clause, may "impose a tax which discriminates against

interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357 362, 3 L.Ed.2d 421 (1959).

The antidiscrimination principle, and several other principles that have evolved through years of Commerce Clause litigation, have been incorporated into the four-part test enunciated by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). *Complete Auto* reiterated the oft-stated maxim that a state's taxing law is not *per se* invalid merely because it burdens interstate commerce since interstate commerce may constitutionally be required to "pay its way," *i.e.*, its just share of the state's expenditures for services provided. *Maryland v. Louisiana*, *supra*. However, the Commerce Clause places limitations on the state's right to tax interstate commerce. A state tax upon interstate commerce will violate the Commerce Clause unless it: (1) has a substantial nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, *supra* at 430 U.S. 277-78, 97 S.Ct. 1078-79; *Maryland v. Louisiana*, *supra* at 451 U.S. 754, 101 S.Ct. 2133.[12]

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[12] It could be argued with some authority that the highway user fees in the instant appeals should be judged not by the *Complete Auto* four-part test, but by a test more specifically attuned to these particular types of taxes or fees, namely charges "imposed by the State for the use of state-owned transportation or other facilities or services." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621, 101 S.Ct. 2946, 2955, 69 L.Ed.2d 884 (1981), *citing Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 41 L.Ed.2d 620 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939); *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 (1937). In such cases, it is arguable that only the third and fourth facets of the *Complete Auto* standard are relevant and that the fees or charges will be judged solely to determine whether they discriminate against

In applying this test, the focus is always upon the effect or economic consequences of the state tax upon interstate commerce. *See, e.g., Complete Auto, supra*; *Westinghouse Electric Co. v. Tully*, 466 U.S. 388, 104 S.Ct. 1856, 80 L.Ed.2d 388 (1984); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615, 101 S.Ct. 2946, 2952, 69 L.Ed.2d 884 (1981) ("In reviewing Commerce Clause challenges to state taxes, our goal has . . . been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 [100 S.Ct 1223, 63 L.Ed.2d 510] . . . (1980).") As stated in *Maryland v. Louisiana*, supra:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 61 S.Ct. 334, 335, 85 L.Ed.2d 275 (1940). 451 U.S. at 756, 101 S.Ct. at 2134 (further citations omitted).

The delicate balance between conflicting state's interests (the right to charge a user for services rendered) and those of interstate commerce (to be free of unlawful and unfair burdens and regulations) requires careful analysis of "the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exchange v. State Tax Commission*, *supra*

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interstate commerce and whether the fees are "manifestly disproportionate to the services rendered." *Commonwealth Edison Co. v. Montana*, *supra* at 453 U.S. 622, n.12, 101 S.Ct. 2956, n.12; *Evansville-Vanderburgh Airport*, *supra*. Nevertheless, as the parties and the Commonwealth Court have proceeded in these cases under the *Complete Auto* analysis, and since the "user fee" standards are incorporated within the *Complete Auto* test, we will apply *Complete Auto* in our analysis of the challenged statutes.

at 429 U.S. 321, 97 S.Ct. 603; *Westinghouse Electric Co. v. Tully, supra.* Moreover, in challenging the constitutionality of a state's taxing legislation under the Commerce Clause, the burden is on the challenger to overcome the presumption of validity given to all such legislation. *Evansville-Vanderburgh Airport, supra* at 405 U.S. 713, 92 S.Ct. 1353; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 548, 70 S.Ct. 806, 809, 94 L.Ed. 1053 (1950). *See also The Statutory Construction Act of 1972*, 1 Pa. C.S.A. § 1922(3) (The General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth). It has been previously noted, "[Pennsylvania] case law involving the constitutionality of state taxation places a very heavy burden on those who seek to upset such taxation." *Campbell v. Coatesville Area School District*, 440 Pa. 496, 501, 270 A.2d 385, 388 (1970). *See also Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349, 1351-52 (1985) (tax legislation will not be declared unconstitutional unless it "clearly, palpably, and plainly violates the constitution"). Thus, the burden is upon the party challenging a statute's constitutionality to "clearly, palpaby, and plainly" show that the statute violates the Constitution. *Commonwealth v. Robinson*, 497 Pa. 49, 53, 438 A.2d 964, 966 (1981).

With the foregoing standards to guide us, we will review the marker fee and the axle tax to determine their validity under the Commerce Clause.

A. THE MARKER FEE—ACT 68 AMERICAN TRUCKING I

As noted, the $25.00 marker fee imposed by Act 68 (then-in-effect 75 Pa.C.S.A. § 2101(b)) is a flat fee imposed for the privilege of using Pennsylvania's highways. The marker fee clearly satisfies the first two elements of the *Complete Auto* test. It is applied to an activity—the use of Pennsylvania's highways for interstate commerce—with a substantial nexus to Commonwealth. There is also

no issue as to whether it is "fairly apportioned" between several taxing states each having a substantial nexus with the activity (as with a tax on gross sales receipts wherein two or more states have contributed to the sales and may each, therefore, lay claim to some portion of the receipts) becasue the activity taxed is a purely local event. Appellees attack the validity of the marker fee under the third and fourth facets of the *Complete Auto* test arguing that it discriminates against interstate commerce and that it is not fairly related to the services provided by the Commonwealth. We reject both arguments.

There is obviously no discrimination if Pennsylvania registered and non-Pennsylvania registered motor carriers are equally burdened by the marker fee. The difficulty is that Act 68 collected $25.00 per vehicle from all motor carriers using Pennsylvania roads, but then "deemed" that fee as incorporated within Pennsylvania's registration fee. Appellees call this "deeming" a clever pretext insulating Pennsylvania registered vehicles from the impact of the marker fee. The Commonwealth Court accepted this argument based upon its finding that the word "deemed" as used in section 2101(b) was vague and ambiguous and its reliance upon the legislative history of Act 68 and its precursor, Senate Bill No. 10, from which it "divined" a discriminatory intent. (See note 11, *supra*). The Commonwealth Court's finding of ambiguity, its reliance on legislative history and the conclusion that court "divines" therefrom are erroneous.

Under our rules of statutory construction we are to resort to an act's contemporaneous legislative history only when the language of the act is ambiguous. 1 Pa.C.S.A. §§ 1921(b) and (c)(7).[12] Because we find the language

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[12] Even in that instance, however, the relevant legislative history would be that which is contemporaneous to the time of the act's passage. Here the Commonwealth Court superimposed upon the legislative history of Act 68 that of Senate Bill 10 which was in-

of § 2102(b) clear and free from ambiguity, we find the Commonwealth Court's heavy reliance upon Act 68's legislative history unwarranted.

According to Webster's Third New International Dictionary, the common definitions of the word "deem" are "to judge; classify after some reflection; hold." We are obligated to use the common meaning of words when construing statutes. 1 Pa.C.S.A. § 1903. Thus under section 2102(b), for Pennsylvania-registered vehicles, the marker fee has been classified, adjudged or held to be included in the vehicle registration fee. When the language of a statute can be interpreted free of ambiguity, it is not for the court to create an ambiguity. *See e.g. Hellertown Manufacturing Company v. Commonwealth*, 480 Pa. 358, 365, 390 A.2d 732, 735 (1978).

In finding the word "deemed" to be vague, and resorting to legislative history to "divine" a discriminatory legislative intent, it would seem that the Commonwealth Court simply chose not to believe the legislature when it stated that the marker fee is "deemed a part of and included within" Pennsylvania's vehicle registration fees. Thus that court seems to have presumed that the General Assembly intended to violate the Constitution. Obviously, the judiciary has no authority to presume such an unconstitutional motive or intent by a co-equal branch of government. 1 Pa.C.S.A. § 1922(3).

Moreover, and most critically, it was improper for the Commonwealth Court to focus almost exclusively upon the legislative intent since Commerce Clause jurisprudence dictates that we assess the state tax "in light of its *actual effect* considered *in conjunction with other provi-*

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troduced a year before Act 68 and which was never enacted. We cannot assume that the legislative intent is a constant. The legislative intent behind Senate Bill 10 was extinguished when that bill failed to pass, and cannot be superimposed upon the legislative intent behind Act 68.

sions of the state's tax scheme," and determine whether the statute does *in practical operation work discrimination against interstate commerce. Maryland v. Louisiana, supra* at 451 U.S. 756, 101 S.Ct. 2134. So viewed, it is apparent that the marker fee does not work *any* discrimination against interstate commerce in practical operation.

There is no question that Pennsylvania registered vehicles pay a substantial registration fee which members of the class represented by appellees are not subject to. There is also no question that Act 68 actually and simultaneously increased that registration fee by anywhere from $45.00-$228.00 for the vehicles in the class affected by the marker fee. Thus, while the interstate motor carriers in the class represented by appellees were charged $25.00 per vehicle, Pennsylvania registered vehicles were charged that $25.00 *plus increased registration fees of an additional* $20.00-$203.00. There is no discrimination, therefore, against interstate commerce since Act 68 imposed a $25.00 marker fee on all motor carriers in the class represented by appellees and deemed a like amount of the simultaneous increase in Pennsylvania registration fees as the marker fee for Pennsylvania registered vehicles. *In each instance,* Act 68 placed a greater burden upon "local commerce" (Pennsylvania registered motor carrier vehicles) than upon "interstate commerce" (motor carrier vehicles represented by appellees).

Because there is no discrimination in the imposition of the marker fee upon interstate motor carriers represented by appellees, we must uphold Act 68 unless it fails the fourth facet of the *Complete Auto* test, *i.e.*, unless it is not fairly related to the services provided by the Commonwealth of Pennsylvania. Such is not the case.

Appellees accept the $5.00 administrative costs associated with the marker fee (*see* note 4, *supra*) as "fairly related" to the services provided by the Commonwealth, but they contend that the additional $20.00 which goes into the Motor License Fund is "wholly unrelated" to any

services provided by the Commonwealth or received by non-Pennsylvania registered motor carriers. Essentially, this argument is that flat taxes, such as the marker fee, are not fairly related to the services provided by a state because it can reasonably be expected that "interstate commerce" will use those services (the highways and related facilities/services) less than "local commerce", and thus will produce a greater impact upon "interstate commerce" in terms of cost per mile of the marker fee or any other flat tax.[15] This argument misconstrues the nature of the "fairly related" requirement of the Commerce Clause as it applies to flat fees and taxes.

In *Commonwealth Edison Co. v. Montana*, *supra*, the United States Supreme Court considered a Commerce Clause challenge to Montana's severance tax on coal extracted from within its borders. The appellants there argued that the severance tax discriminated against interstate commerce and that it was not fairly related to the services provided by Montana. Prefatory to its discussion of whether Montana's severance tax was "fairly related" to services provided, that Court stated:

> [I]n reviewing appellants' contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. *See, e.g. Evansville-Vanderburg Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 [92 S.Ct. 1349,

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[15] There is overlap between the various "prongs" of the *Complete Auto* test. Appellees' "cost per mile" argument concerning the nature of flat taxes generally, and the marker fee specifically, clearly raises discrimination concerns under the third prong as well as the fourth. *See e.g., Commonwealth Edison Co. v. Montana*, *supra* at 453 U.S. 620, 101 S.Ct. 2955 ("appellants' discrimination theory [that the tax burden borne by the out-of-state consumers of Montana coal is excessive] . . . is, of course, merely a variant of appellants' assertion that the Montana tax does not satisfy the 'fairly related' prong . . . .").

31 L.Ed.2d 620] (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 [59 S.Ct. 744, 83 L.Ed.2d 1001] (1939); *Ingels v. Morf*, 300 U.S. 290 [57 S.Ct. 439, 81 L.Ed.2d 653] (1937).[12]

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[12] As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 [51 S.Ct. 380, 75 L.Ed. 953] (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered . . . ." *Clark v. Paul Gray, Inc.*, 306 U.S. at 599 [59 S.Ct. at 753], *Ingels v. Morf*, 300 U.S. at 296-297 [57 S.Ct. at 442-443].

453 U.S. at 621-22 & n. 12, 101 S.Ct. at 2955-56 & n. 12 (parallel citations omitted).

In *Evansville-Vanderburgh Airport, supra*, 405 U.S. 707, 92 S.Ct 1349, 31 L.Ed.2d 620 (1972), the United States Supreme Court rejected a Commerce Clause challenge to the imposition of a $1.00 per passenger fee imposed by the airport authority upon each passenger enplaning on a commercial airplane. The Court there stated:

> We . . . regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike . . . . The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.
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> * * * *
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> Our decisions concerning highway tolls are instructive. They establish that the States are empowered to develop "uniform, fair and practical" standards for this type of fee . . . (Numerous citations omitted.)

We have also held that a State may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive. *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 [55 S.Ct. 709, 79 L.Ed. 1489] (1935); *Morf v. Bingaman*, 298 U.S. 407 [56 S.Ct. 756, 80 L.Ed. 1245] (1936); *Aero Mayflower Transit Co. v. Board of Railroad Comm'n*, 332 U.S. 495 [68 S.Ct. 167, 92 L.Ed. 99] (1947). And in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 [70 S.Ct. 806, 94 L.Ed. 1053] (1950), the Court sustained a Maryland highway toll of "2% upon the fair market value of motor vehicles used in interstate commerce." That toll was supplemental to a standard mileage charge imposed by the State, so that "the total charge as among carriers [did] vary substantially with the mileage traveled." *Id.* [339 U.S.], at 546 [70 S.Ct. at 808]. It was there argued, however, that the correlation between tax and use was not precise enough to sustain the toll as a valid user charge. Noting that the tax "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," *id.*, at 545 [70 S.Ct. at 808], the Court rejected the argument:

"Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' *Harvester Co. v. Evatt*, 329 U.S. 416, 422-423 [67 S.Ct. 444, 447, 91 L.Ed. 390]. Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which

> on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co. v. Georgia Comm'n*, 295 U.S. 285, 289 [55 S.Ct. 709, 710, 79 L.Ed. 1439]. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Id.* [339 U.S.], at 546-547 [70 S.Ct. at 809].

405 U.S. at 714-716, 92 S.Ct. at 1354-1355 (parallel citations omitted).

Furthermore, the fact that a flat tax imposed upon all commerce, interstate and local alike, *may* have a greater impact upon interstate commerce, *if* such commerce actually uses the services or facilities less than local[16] commerce, is inconsequential to our Commerce Clause analysis. Interstate motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that, because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania *may* use them, the burden of the flat fee falls too heavily upon them. "One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *American Trucking Associations, Inc. v. Goldstein*, 301 Md. 372, 483 A.2d 47 (1984) *quoting Areo Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 289, 55 S.Ct. 709, 711, 79 L.Ed. 1439 (1935). *See also Aero Mayflowers Transit Co. v. Board of Railroad Comm'n*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (1947); *Clark v. Paul*

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[16] Given the nature of the interstate motor carrier industry, it is not apparent that non-Pennsylvania registered vehicles use the Commonwealth's highways less frequently than their Pennsylvania counterparts. Some do and some do not. There are many Pennsylvania registered motor carrier vehicles, indeed some who are members of ATA, who do most of their interstate traveling outside of Pennsylvania, and the converse is also frequently the case. Brief for Appellants at 22, n.15.

Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed.2d 1001 (1939); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, L.Ed. 1053 (1950).

Thus, so long as the flat fee charged is not manifestly disproportionate to the services rendered, *i.e.*, not excessive, the fee is "fairly related" to those services for Commerce Clause purposes. Moreover, the burden is on the challenger to demonstrate that the flat fee is excessive in relation to the services charged. *Clark v. Paul Gray, Inc.*, *supra* 306 U.S. at 599, 59 S.Ct. at 753 and cases cited therein; *Evansville-Vanderburgh Airport*, *supra*. Appellees have failed to sustain this burden.

All Pennsylvania highway user fees are deposited into the Motor License Fund and expended solely for road-related purposes. JSF para. 64. For the period from April 1, 1981 through November 30, 1982, total highway user fees collected from all motor carrier vehicles subject to the marker fee amounted to approximately $304 million. JSF para. 99. The marker fee portion of the Motor Carrier Road Tax Act for that period was approximately $12,594,000.00. JSF paras. 70 and 71. For that same period, Motor License Fund expenditures for highway construction and maintenance, state police services and construction bond debt service totalled approximately $1½ *billion*. JSF paras. 46-51. While cars and other vehicles not subject to the marker fee also use the Commonwealth's highways and benefit from these expenditures, JSF para. 52, use of the highways by the heavier vehicles subject to the marker fee necessitate significantly higher road-related expenditures than these lighter vehicles in the categories of construction of road bases and surfaces, construction of bridges, paving of road shoulders, road-grading and drainage and truck weight facilities. JSF para. 53. It is apparent that appellees have failed to sustain their burden of demonstrating that the marker fee is excessive, manifestly disproportionate to the services rendered or not fairly related to those services.

For the foregoing reasons, we hold that the Commonwealth Court erred in declaring Act 68 and then-in-effect section 2102(b) of the Vehicle Code (the marker fee) unconstitutional under the Commerce Clause, and we therefore reverse that decision and order.

B. THE AXLE TAX—ACT 234 AMERICAN TRUCKING II

The axle tax is a modified flat fee since it is imposed in accordance with actual use for motor carrier vehicles traveling less than 2,000 miles annually in the Commonwealth and at a flat $36.00 per axle fee after 2,000 miles are traveled. Again, the tax clearly passes constitutional muster under the first two facets of *Complete Auto*, the "substantial nexus" and "fairly apportioned" requirements. The principal challenge to the validity of the axle tax is premised upon the third and fourth prongs of the *Complete Auto* standard, namely that it discriminates against interstate commerce and that it is not "fairly related to services provided."

Obviously, the axle tax itself, standing alone, is incapable of discrimination. Section 9902 of the Vehicle Code imposes the $36.00 per axle fee on "every truck, truck tractor or combination having a gross weight or gross registered weight in excess of 26,000 pounds operated on the highways of this Commonwealth." On its face and in actual operation, this axle tax is collected from Pennsylvania and non-Pennsylvania registered vehicles alike.

The difficulty, however, is when we place the axle tax in conjunction with all other relevant taxing provisions, as we must, particularly Act 234's simultaneous reduction of the registration fees paid by Pennsylvania registered vehicles subject to the axle tax. As noted, that registration fee reduction almost exactly offsets the $36.00 per axle tax. Appellees argue that Act 234, therefore, was intended to and actually did discriminate against interstate commerce and impose the full brunt of the axle

tax upon interstate (non-Pennsylvania registered) commerce. At first blush, this is an appealing argument.

Appellants concede that in reducing the Pennsylvania registration fees by amounts offsetting the $36.00 per axle tax, it indeed intended to lessen the burden imposed upon "local commerce." However, appellants deny that the effect of this reduction in registration fees is to discriminate against interstate commerce in favor of local commerce. Rather, appellants contend that Act 234 "effects a rational restructuring of Pennsylvania's highway user charges" which is a lawful and nondiscriminatory restructuring under the Commerce Clause. We agree.

The Commonwealth Court held:

> [W]e conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid.

87 Pa.Commw. at 383, 487 A.2d at 467.

Once again, the Commonwealth Court's focus was far too narrow. Non-Pennsylvania registered motor carrier vehicles pay the $36.00 per axle tax plus the $5.00 marker fee; motor carrier vehicles registered in an IRP jurisdiction pay the axle tax plus an apportioned Pennsylvania registration fee; Pennsylvania registered motor carrier vehicles pay the axle tax plus the full Pennsylvania registration fee. There is no discrimination against interstate commerce in such a taxing scheme in practical operation. In focusing solely on the registration fee *reductions*, the Commonwealth Court ignores the fact that

"local commerce" (Pennsylvania registered motor carrier vehicles) remains subject to substantial highway user fees that "interstate commerce" (vehicles owned by members of the class and subclass represented by appellees) is not subject to.

We reiterate that the focus of the Commerce Clause must always be upon the actual effect or economic consequences of the state tax upon interstate commerce.

> A state tax must be assessed in light of its actual effect *considered in conjunction with other provisions of the State's tax scheme.* "In each case it is our duty to determine whether the statute under attack, *whatever its name may be*, will in its practical operation work discrimination against interstate commerce. (emphasis added.)

Maryland v. Louisiana, *supra* at 451 U.S. 756, 101 S.Ct. 2134.

In assessing the practical effect of Act 234, we need go no further than appellees' own illustration set forth in their class action complaint.

> 30. For example, under the annual registration fee schedule set out in Section 1916 for the 1982 registration year, a truck driver and trailer combination registered in Pennsylvania for a maximum weight of 80,000 pounds would pay $1125 for a one-year registration.
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> 31. For the 1983 registration year, that same five-axle combination will pay only $945 under the Section 1916 annual registration fee schedule as amended by Act 234. However, that combination must now also pay $36 per axle for each of its five (5) axles, or a total Axle Tax of $180.
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> 32. The $945 registration fee plus the $180 Axle Tax paid by the motor carrier operating a Pennsylvania-based vehicle will cause it to pay $1125 to

> register its vehicle in the Commonwealth—exactly the same amount as the registration fee prior to Act 234.

Complaint paras. 30-32. To this illustration, we add the undisputed fact that the comparable fees for a five-axle, 80,000 pound combination registered in a foreign non-IRP jurisdiction and operating in Pennsylvania will be $185.00, *i.e.*, an axle tax of $180.00 plus $5.00 marker fee.

Thus, while appellees are correct that a Pennsylvania registered five-axle, 80,000 pound combination pays the same total amount in registration fees and axle tax that it paid solely in registration fees prior to the passage of the Act 234, this fact does not prove any discriminatory effect. Rather, the operative fact is that the Pennsylvania registered combination is subject to an *additional* $940.00 in highway user fees that its counterpart registered in a foregin, non-IRP jurisdiction is not subject to. Similarly, a five-axle, 80,000 pound combination registered in an IRP member jurisdiction will pay some portion of that *additional* $940.00 registration fee that its counterpart in a foreign, non-IRP jurisdiction will not.

Members of the class and subclass represented by appellees ("interstate commerce") thus bear less of the burden of Pennsylvania's highway user fees than do Pennsylvania registered motor carrier vehicles ("local commerce"). Accordingly, the axle tax and Act 234, considered in conjunction with all other provisions of Pennslyvania's highway user fee system, works no discrimination against interstate commerce in practical operation. It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme. *Alaska*

v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937). In easing the burden on Pennsylvania registered vehicles, the Commonwealth has neither disadvantaged interstate commerce nor favored local commerce, and the axle tax does not, therefore, discriminate against interstate commerce.

The axle tax is also not excessive or unrelated to the services provided by the Commonwealth. The axle tax proceeds are deposited into the Highway Bridge Improvement Restricted Account within the Motor License Fund, 75 Pa.C.S.A. § 9907(a), and expended on bridge rehabilitation, replacement and removal projects, *id.* at § 9908. Expenditures under this bridge improvement program will exceed $1 billion over 5 years. (Additional revenues of $420 million from federal funding and $400 million from local governments will increase the expenditures by a like amount.) The axle tax revenues generated in fiscal 1983-84 were approximately $68 million in axle tax fees from *all* interstate motor vehicles, and an additional $4.5 million trip permit revenues which may be paid in lieu of the axle tax. 75 Pa.C.S.A. § 2102 (d). (Appellees do not dispute these figures for expenditures and revenues. *See* Appellant's Brief at 6, n. 6 and reproduced record at R. 156-58.)

Furthermore, rebates are given for "incidental use" (under 2000 miles annually) and trip permits are available for occasional use. Under all of these circumstances, appellees have failed to sustain their burden of demonstrating that the axle tax is excessive or is not fairly related to the services provided by the Commonwealth.

Appellees argue, and the Commonwealth Court held, that Act 234's reduction in Pennsylvania registration fees demonstrate a discriminatory intent and amounted

to "economic protectionism." As Justice Benjamin Cardozo stated, "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. . . . Catch words and labels, such as the words 'protective tariff' [or 'economic protectionism'], are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Henneford v. Silas Mason Co.*, *supra* at 300 U.S. 586, 587, 57 S.Ct. 529.

For the foregoing reasons, we hold that the Commonwealth Court erred in declaring Act 234 and section 9902 of the Vehicle Code (the axle tax) unconstitutional under the Commerce Clause, and we therefore reverse that decision and order.

IV

ADDITIONAL CONSTITUTIONAL CHALLENGES

In all three cases before us, the class action plaintiffs have also challenged the highway user fees on equal protection, uniformity, and privileges and immunities grounds. Almost all of their efforts have been devoted to attacking the highway user fees on Commerce Clause grounds, and the remaining constitutional issues are *all* premised on allegations of discriminatory effect. Since we have determined that neither the marker fee nor the axle tax work a discriminatory effect upon interstate commerce, these remaining constitutional challenges must therefore be rejected.

V

AMERICAN TRUCKING III

As appellants (ATA and the two non-Pennsylvania corporations) in this case inform us, this action is identical to that of *American Trucking I* except for the time frame for which refunds have been sought. Since we

have rejected the constitutional challenges to the marker fee in *American Trucking I*, appellants' challenge here must necessarily fail. Accordingly, we will affirm the order and decision of the Commonwealth Court sustaining appellees' preliminary objections in this case and need not address the propriety of that court's ruling regarding exhaustion of remedies.

VI

Accordingly, the following orders are entered:

The order of the Commonwealth Court entered in No. 315 C.D.1982, 87 Pa.Commw. 345, 487 A.2d 468 (No. 11 M.D.Appeal Docket 1985), *American Trucking I*, is reversed, appellant's exceptions are granted and judgment is entered for appellants.

The order of the Commonwealth Court entered in No. 267 C.D.1983, 87 Pa.Commw. 379, 487 A.2d 465 (No. 12 M.D.Appeal Docket 1985), *American Trucking II*, is reversed, appellants' motion for summary judgment is entered for appellants.

The order of the Commonwealth Court entered in No. 160 C.D.1984, 87 Pa.Commw. 418, 489 A.2d 269 (No. 19 M.D.Appeal Docket 1985), *American Trucking III*, is affirmed.

Flaherty, J., did not participate in the consideration or decision of this case.

Nix, C.J., files a concurring and dissenting opinion in which he "agrees with the results reached by the majority in *American Trucking I*, No. 11 M.D.Appeal Docket 1985, and *American Trucking III*, No. 19 M.D.Appeal Docket 1985", but dissents in *American Trucking II*, No. 12 M.D.Appeal Docket 1985; McDermott, J., joins this concurring and dissenting opinion.

NIX, Chief Justice, concurring and dissenting.

While I agree with the results reached by the mapority in *American Trucking I*, No. 11 M.D.Appeal Docket 1985, and *American Trucking III*, No. 19 M.D.Appeal Docket 1985, I believe the analysis employed by the majority in *American Trucking II*, No. 12 M.D. Appeal Docket 1985, reflects less than a full comprehension of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3.

The basic purpose of the Commerce Clause is to prohibit a state from taxing interstate commerce in a manner which discriminates against interstate commerce "by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed. 2d 421 (1959). It is thus necessary to examine the Axle Tax for Highway Bridge Improvement Act ("Axle Tax"), Act of December 8, 1982, P.L. 842, No. 234, 75 Pa.C.S. §§ 9901 *et seq.* ("Act 234"), to determine whether it discriminates in favor of local interests to the derogation of the free flow of interstate commerce.

As recognized by the majority, the seminal case setting forth the mode of analysis under the Commerce Clause is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). In that case the Supreme Court overruled a series of cases which had held that any state tax on "the privilege of doing business" imposed on a multi-state business was *per se* unconstitutional. *See, e.g., Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946). The Court favored an approach which looked to the practical effect of the challenged state tax statute. *Complete Auto Transit, Inc. v. Brady*,

supra 430 U.S. at 279, 97 S.Ct. at 1079. Under this approach a tax is sustained against a Commerce Clause challenge when it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discrimnate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id. See also Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S.Ct. 2114, 2133, 68 L.Ed.2d 576 (1981), *citing Washington Revenue Dept. v. Washington Stevedoring Assn.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 1399, 55 L.Ed.2d 682 (1978).

It is only when all four conditions of *Complete Auto Transit, Inc. v. Brady, supra*, are met that a state tax is not *per se* invalid because it burdens interstate commerce, since interstate commerce may constitutionally be made to pay its way. *Maryland v. Louisiana, supra* 451 U.S. at 754, 101 S.Ct. at 2133. As stated in *Maryland*:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 [61 S.Ct. 334, 335, 85 L.Ed. 275] (1940). See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 [83 S.Ct. 1201, 1203, 10 L.Ed.2d 202] (1963); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 478-480 [52 S.Ct. 631, 633-635, 76 L.Ed. 1232] (1932).
>
> *Maryland v. Louisiana, supra*, 451 U.S. at 756, 101 S.Ct. at 2134.

This standard was succinctly phrased by the Commonwealth Court in *American Trucking II*, 87 Pa.Commw. 379, 487 A.2d 465 (1985):

> Commerce Clause jurisprudence distinguishes between two types of legislation: (1) protectionist measures that are infused with discriminatory purpose or effect and (2) facially neutral acts that regulate evenhandedly to promote legitimate local interests, with incidental effects on interstate commerce. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 [98 S.Ct. 2531, 2535, 57 L.Ed.2d 475] (1978). Economic protectionist legislation is subject to a "virtually *per se* rule of invalidity," while a facially neutral measure is invalidated whenever burdens on interstate commerce clearly outweigh putative local benefits. *Id.*
>
> *Id.* 87 Pa.Commw. at 382, 487 A.2d at 467.

It is therefore incumbent upon the reviewing court to determine whether the challenged statute, in practical operation, works discrimination against interstate commerce in purpose or effect.

Turning to the statute challenged in *American Trucking II*, I believe the majority incorrectly focuses upon the plethora of rationalizations submitted in support of the Axle Tax rather than the practical operation of the Axle Tax itself. Section 3 of Act 234 assessed a maximum tax of thirty-six (36) dollars per axle against both foreign-registered and Pennsylvania registered motor carrier vehicles that travel at least two thousand (2000) miles annually in Pennsylvania having a gross weight or registered gross weight in excess of twenty-six thousand (26,000) pounds. Section 1 of Act 234, however, simultaneously amended section 1916(a) of the Vehicle Code, 75 Pa. C.S. § 1916(a), and beginning with the weight class upon which the Axle Tax is first imposed (twenty-six thousand (26,000) pounds) reduced the annual Penn-

sylvania truck registration fees in multiples of thirty-six (36) dollars.[1]

The Commonwealth Court found that "[w]hile Section 3 of Act 234 assesses an Axle Tax against all designated vehicles operating in Pennsylvania, Section 1 of Act 234, by authorizing comparable registration fee reductions,

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[1] The reductions correspond to the number of axles most commonly used and minimally required by law in each weight class. *See* 75 Pa. C.S. § 4941. The following schedule is illustrative:

CLASS	WEIGHT	AMOUNT REDUCED
9	26,001-30,000	$ 72
10	30,001-33,000	72
11	33,001-36,000	72
12	36,001-40,000	72
13	40,001-44,000	108
14	44,001-48,000	108
15	48,001-52,000	108
16	52,001-56,000	108
17	56,001-60,000	108
18	60,001-64,000	144
19	64,001-68,000	144
20	68,001-73,280	144
21	73,281-76,000	180
22	76,001-78,000	180
23	78,001-78,500	180
24	78,501-79,000	180
25	79,001-80,000	180

Except in a few instances, the reductions created by the Act were intended to and did exactly offset the impact of the Axle Tax upon motor carrier vehicles registered in Pennsylvania. For example, under the annual registration fee schedule in force just prior to the Act, a five-axle truck tractor and trailer combination registered in Pennsylvania for a maximum weight of 80,000 pounds was subject to a one-year registration fee of $1125. For the 1983 Axle Tax registration year, that same five-axle combination still was only subject to a total fee of $1125. The reduced registration fee was $945 and the five-axle combination was subject to a tax of $36 per axle, or an Axle Tax of $180. The total ($945 + $180 = $1,125) is exactly the same amount as the registration fee prior to the passage of the Act.

negates or mitigates the financial impact of the Axle Tax on Pennsylvania-registered vehicles." *See American Trucking II, supra* at 382, 487 A.2d at 467. The court concluded that Act 234 amounted to economic protectionist legislation which facially discriminated against interstate commerce. *Id., quoting Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Maryland v. Louisiana, supra.* I agree.

Appellants concede the unequal financial impact of Act 234. Appellants' Brief at 12. The primary thrust of appellants' argument is that the legislative purpose behind Act 234 was to effect a rational restructuring of Pennsylvania's highway user charges. *Id.* at 17-18. Appellants place great weight upon the fact that Act 234 impacts the most upon those vehicles which have in the past not paid any Pennsylvania registration fees, *i.e.*, out-of-state vehicles not participating in the IRP program. *Id.* at 16-17. Appellants also argue that both before and after the enactment of Act 234, Pennsylvania registered trucks pay more money to Pennsylvania for the privilege of using its roads than do vehicles registered elsewhere. *Id.* at 19. Additionally, appellants contend that the restructuring effected by Act 234 will attract more vehicle registration in Pennsylvania. *Id.* at 20. Nevertheless, as the following Commerce Clause analysis as set forth by decisions of the United States Supreme Court demonstrates, appellants' factual assertions as to the purpose of Act 234 do not raise that act, which on its face discriminates against interstate commerce, to a level of constitutionality.

The basic fallacy of the majority's analysis is its acceptance of appellants' premise that the legislative purpose of Act 234 was to restructure Pennsylvania's highway user charges. It is notable, however, that there is nothing in the statute itself or in the circumstances surrounding the enactment of Act 234 which adds legitimacy to appellants' position that it was designed to restructure the tax burden upon the trucking industry in

this Commonwealth. In fact, the legislature expressed a clearly parochial purpose, the rehiring of Pennsylvania's unemployed, for the enactment of the Axle Tax. Section 9907(b) of the tax states:

> (b) Purpose of tax.—It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, *to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth.* In order to reach this goal, firms with *Pennsylvania-based facilities* shall be actively solicited to make bids on contracts to furnish products and materials, including, but not limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.
>
> 75 Pa.C.S. § 9907(b) (emphasis added).

Thus, appellants' argument that the purpose of the Axle Tax was to effect a rational restructuring of tax burdens is specious, and the majority's reliance upon this assertion rises to no higher level. Moreover, even though the Commonwealth has a legitimate interest in providing employment for Pennsylvanians, I find that in the instant case the state chose an unconstitutional means to effect this goal.

In *Philadelphia v. New Jersey*, *supra*, the State of New Jersey raised the argument that its statute prohibiting the importation of most solid or liquid waste which originated or was collected outside the territorial limits of the State was actually no more than a legislative effort to suppress competition and to stabilize the cost of solid waste disposal for New Jersey residents. *Id.* at 626, 98 S.Ct. at 2536. In answer to this argument on legislative purpose, the Supreme Court wrote:

> *This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be*

> *relevant to the constitutional issue to be decided in this case.* Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim . . . is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. *But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against article of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect* [*this statute*] *violates this principle of nondiscrimination.*
>
> *Id.* at 626-27, 98 S.Ct. at 2536-37 (emphasis added).

The Supreme Court of the United States has consistently found parochial legislation such as Act 234 invalid, regardless of the ultimate legislative goal. *See, e.g., Toomer v. Witsell*, 334 U.S. 385, 403-04, 68 S.Ct. 1156, 1165-66, 92 L.Ed. 1460 (1948) (goal to create jobs by keeping industry within the State); *Edwards v. California*, 314 U.S. 160, 173-74, 62 S.Ct. 164, 166-67, 86 L.Ed. 119 (1941) (attempt to preserve the State's financial resources from depletion by fencing out indigent immigrants); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-24, 55 S.Ct. 497, 500-01, 79 L.Ed. 1032 (1935) (aim was to assure a steady supply of milk by erecting barriers to allegedly ruin outside competition). These cases show that the presence of a presumably legitimate goal, *i.e.*, rehiring of unemployed Pennsylvanians, does not constitutionalize a state statute which operates to discrimi-

nate against vehicles solely because of their origin. Act 234, by effecting a tax burden only upon those out-of-state vehicles with no financial nexus to Pennsylvania's registration fee, imposes a tax based solely upon out-of-state origin.

In response to the majority's observations that Act 234 impacts most upon out-of-state vehicles which have not in the past paid any of Pennsylvania's registration fee, and that the "reallocation" effected by Act 234 will attract more vehicle registration in Pennsylvania, I counter that these observations do nothing more than to demonstrate the discriminatory nature of Act 234. As I previously quoted, "[t]he basic purpose of the Commerce Clause is to prohibit a state from taxing interstate commerce in a manner which discriminates against interstate commerce 'by providing a direct commercial advantage to local business.'" *Northwestern States Portland Cement Co. v. Minnesota*, *supra*, 358 U.S. at 458, 79 S.Ct. at 362. State legislatures can neither protect local businesses nor seek to induce businesses to locate in the state by way of burdening only interstate commerce. *See Maryland v. Louisiana*, *supra*; *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977); *Best & Co., Inc. v. Maxwell*, 311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 275 (1940). Thus, the majority's observations manifest the very evils the Commerce Clause was designed to protect against.

The majority relies heavily on the fact that Pennsylvania-registered vehicles pay more fees to Pennsylvania than do out-of-state registered vehicles. What the majority ignores, however, is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. Just as Pennsylvania-registered vehicles pay a registration fee to the state of Pennsylvania, so do out-of-state registered vehicles pay such a fee in their respective jurisdictions. Naturally, a state has a rational basis for exacting more

fees from in-state-registered vehicles than from out-of-state registered vehicles. Thus, the majority's revelation of the "operative fact" that Pennsylvania-registered vehicles are subject to $940.00 in registration fees which the foreign-registered, non-IRP counterparts are not subject to, comes as no startling surprise. The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment, rather it serves instead to shift an additional financial burden *only* upon interstate commerce.[2] The protectionist nature of this legislation is evident and cannot be ignored. Should every state impose such a tax to burden only out-of-state registered vehicles, the impact upon interstate commerce would indeed be crippling.[3]

Appellants attempt to hinge the legal determination of the constitutionality of Act 234 upon the fact that Pennsylvania is a member of the IRP, an interstate compact. Those out-of-state vehicles participating in the IRP program are also benefited by the decrease in the registration fees under Act 234. This argument erroneously assumes that the Commerce Clause analysis is somehow based upon the percentage of discrimination effected by the statute. *See Maryland v. Louisiana, supra* 451 U.S.

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[2] The majority's reasoning leads them to the inherently inconsistent statement that the "easing" of the burden on Pennsylvania registered vehicles does not favor local commerce. *See* p. 855. Earlier in the majority opinion it is noted that in reducing the Pennsylvania registration fees, it was "intended to lessen the burden imposed upon 'local commerce.'" *Id.* at 853.

[3] Moreover, contrary to the majority's implication that the out-of-state registered vehicles have in the past received a "free ride" on the roads of Pennsylvania, foreign registered vehicles are subject to payment of *inter alia:* (a) special hauling permit fees; (b) the Fuel Use Tax; (c) the Motor Carrier's Road Tax; (d) the Oil Company Franchise Tax; (e) the Gross Receipt Tax; and (f) the Liquid Fuels Tax. Joint Stipulation of Facts at R. 308-09.

at 760, 101 S.Ct. at 2136.[4] As the following facts demonstate, however, the discrimination effected by Act 234 is substantial, notwithstanding, or rather because of, the presence of the compact.

Vehicles registered in IRP jurisdictions pay to each member state in which the vehicle travelled that year, a percentage of the state's registration fee apportionally related to the miles travelled in that state compared to the vehicle's total mileage for that year. Of the total 403,656 vehicles upon which the 1983 axle tax was paid, 83,118 (21%) were Pennsylvania-registered and 126,466 (31%) were from other IRP jurisdiction. *See* Letter from the Office of the Attorney General, dated May 1, 1984 at R. 321, *et seq.* The remaining 194,072 (48%) vehicles upon which the Axle Tax was paid by residents of non-IRP jurisdictions who owned out-of-state registered vehicles. *Id.* The large size of this latter figure is explained by the fact that Pennsylvania, although an IRP state, is completely surrounded by non-IRP jurisdictions.

Hence, those jurisdictions most immediate to Pennsylvania and most likely to travel on Pennsylvania highways are fully impacted by the Axle Tax. Those out-of-state vehicles derive no benefit from the corresponding decrease in registration fees under Act 234, and pay Axle Tax fees to further the parochial purpose of providing employment for Pennsylvania residents. By contrast, Pennsylvania-registered vehicles as well as those vehicles participating in the IRP program are practically fully exempt from the tax because of the corresponding decrease in registration fees under Act 234.

The legal issue presented by the case at bar is synonymous with that presented in *Maryland v. Louisiana*, *supra*, which involved Louisiana's tax on the "first use"

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[4] In *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981), the Supreme Court wrote, "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Id.* at 760, 101 S.Ct. at 2136.

of any natural gas brought into Louisiana which was not previously subjected to taxation by another State or the United States. The primary effect of the tax, which was imposed on pipeline companies, was on gas produced in the Federal Outer Continental Shelf (OCS) and then piped to processing plants in Louisiana and, for the most part, eventually sold to out-of-state consumers. The first-use tax statute (Act) as well as provisions of other Louisiana statutes, provided a number of exemptions from and credits for the tax whereby Louisiana consumers of OCS gas for the most part were not burdened by the tax, but it uniformly applied to gas moving out of the State.

The Supreme Court of the United States found Louisiana's First Use Tax unconstitutional under the Commerce Clause using the following analysis:

> *In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions. No further hearings are necessary to sustain this conclusion.* Under the specific provisions of the First-Use Tax, OCS gas used for certain purposes within Louisiana is exempted from the Tax. . . . Competitive users in other States are burdened with the Tax. Other Louisiana statutes, enacted as part of the First-Use Tax package, provide important tax credits favoring local interests. Under the Severance Tax Credit, an owner paying the First-Use Tax on OCS gas receives an equivalent tax credit on any state severance tax owed in connection with production in Louisiana. . . . *On its face, this credit favors those who both own OCS gas and engage in Louisiana production. The obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to in-*

> *vest in further OCS development or in production in other states.* Finally, under the Louisiana statutes, any utility producing electricity with OCS gas, any natural gas distributor dealing in OCS gas, or any direct purchaser of OCS gas for consumption by the purchaser in Louisiana may recoup any increase in the cost of gas attributable to the First-Use Tax through credits against various taxes or a combination of taxes otherwise owed to the State of Louisiana. . . . Lousiana consumers of OCS gas are thus substantially protected against the impact of the First Use Tax. . . . OCS gas moving out of the State, however, is burdened with the First-Use Tax.
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> 451 U.S. at 756-58, 101 S.Ct. at 2134-35 (footnote omitted, emphasis added).

The above analysis is persuasive that Act 234 facially discriminates against interstate commerce by virtually insulating operators of locally, but not foreignly registered vehicles from its financial impact. Like the Louisiana scheme, the Pennsylvania Axle Tax directly discriminates in favor of local interests. The reductions in multiples of thirty-six (36) dollars correspond to the number of axles ordinarily required on vehicles within each affected weight class. The result is that in almost all instances, the registration fee reductions exactly offset the impact of the Axle Tax upon carriers operating vehicles that are registered in Pennsylvania. The practical effect of the reductions is to exempt Pennsylvania-registered vehicles from the Axle Tax.

Two recent decisions of the Supreme Court of the United States also mandate a finding of unconstitutionality in the instant case. In *Bacchus Imports, Ltd. v. Dias, Director of Taxation of Hawaii*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the state of Hawaii imposed a 20% excise tax on sales of liquor at wholesale. To encourage the development of the Hawaiian liquor industry, however, a brandy distilled from the root of

an indigenous shrub of Hawaii, and a fruit wine manufactured in the State were exempted from the tax. The Supreme Court held that the tax exemption for the brandy and the fruit wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products. The Court found it insignificant that the sales of the exempted beverages constituted only a small part of the total liquor sales in Hawaii. It stated that as long as there is some competition between the exempt beverages and the non-exempt products from outside the State, there was a discriminatory effect. The Court also stated that it is irrelevant to the Commerce Clause inquiry that the legislature's motivation was the desire to aid the makers of the locally produced beverages rather than to harm out-of-state producers.

Similarly, in *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388, 104 S.Ct. 1856, 80 L.Ed.2d 388 (1984), the Court held unconstitutional a New York tax scheme which not only provided an incentive for increased business activity in New York, but also penalized increases in shipping activities in other states. The Court held that whether the New York tax diverted new business into the State or merely prevented current business from being diverted elsewhere, it was still a discriminatory tax that creates an advantage for firms operating in New York by placing a discriminatory burden on commerce to its sister states.

Under the standard set forth in *Complete Auto Transit, Inc. v. Brady, supra*, a statute which discriminates against interstate commerce cannot be sustained. As previously noted, "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana, supra* 451 U.S. at 756, 101 S.Ct. at 2134. The key determination is whether, in practical effect, the statute will work discrimination against interstate commerce.

Complete Auto Transit, Inc. v. Brady, *supra* 430 U.S. at 279, 97 S.Ct. at 1079; *Best & Co. v. Maxwell*, *supra* 311 U.S. at 455-56, 61 S.Ct. at 334-35. Here, although the thirty-six (36) dollar per axle is a tax imposed upon all vehicles of designated classes, whether foreign or Pennsylvania registered, the corresponding reductions in Pennsylvania registration fees demonstrate a legislative intent to provide a direct commercial advantage to local business. *See Northwestern States Portland Cement Co. v. Minnesota*, *supra*, 358 U.S. at 458, 79 S.Ct. at 362. I thus conclude that Act 234 is a protectionist measure infused with discriminatory purpose and effect. *See Philadelphia v. New Jersey*, *supra*. As the Supreme Court observed in *Best & Co., Inc. v. Maxwell*, *supra*, "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." *Id.* 311 U.S. at 455, 61 S.Ct. at 335.

Accordingly, I would affirm the order of the Commonwealth Court entered in *American Trucking II*, docketed at No. 12 M.D. Appeal Docket 1985, and hold that the Axle Tax is unconstitutional to the extent that it discriminates against interstate commerce by providing a direct commercial advantage to Pennsylvania-registered truckers.

McDERMOTT, J., joins in this concurring and dissenting opinion.

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 11, 12 & 19 M. D. Appeal Dockets 1985

AMERICAN TRUCKING ASSOCIATION[S], INC., *et al.*

v.

JAMES I. SCHEINER, Secretary of the Department of Revenue, *et al.*

JUDGMENT

On CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this Court that the orders are entered pursuant to paragraph VI, page 41 of the Majority Opinion.

/s/ Mildred E. Williamson
Deputy Prothonotary

Dated: May 6, 1986

APPENDIX C

COMMONWEALTH COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

Argued Dec. 11, 1984

Decided Feb. 5, 1985

Before CRUMLISH, Jr., President Judge, and ROGERS, WILLIAMS, CRAIG, MacPHAIL, DOYLE and BARRY, JJ.

WILLIAMS, Judge.

Before this Court are respondents' [1] exceptions to Judge Robert W. Williams, Jr.'s Memorandum Opinion and Order of October 17, 1983. We dismiss the exceptions and affirm the order.

American Trucking Associations, Inc. and two foreign-based interstate motor carrier (petitioners) brought an original, class action challenging the constitutionality and seeking to enjoin enforcement of the identification marker fee requirement of Section 2102(b) of the Vehicle Code,

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[1] Respondents include the Commonwealth's Secretary of the Department of Revenue, Attorney General and State Police Commissioner.

75 Pa.C.S. § 2102(b).[2] Petitioners further demand the refunding of all marker fees paid by class members for the year beginning April 1, 1982.

On June 18, 1980, Title 75 of the Vehicle Code was amended by Section 4 of the Act of June 18, 1980, P.L. 229, No. 68 (Act 68), which required that an identification marker, obtainable from the Department of Revenue for $25.00, be affixed to every motor carrier vehicle[3] operating in Pennsylvania. Vehicles bearing identification markers are subject to the record-keeping, reporting and tax-paying requirements of the Motor Carrier Road Tax Act (Road Tax).[4] Operators of Pennsylvania-registered motor carrier vehicles provide notice that they are subject to the Road Tax through registration and are not required to display markers. Respondents' *Brief in Support of Exceptions* at 6 n. 12. Operating a motor carrier vehicle in the Commonwealth without an identi-

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[2] Petitioners represent a class that is certified as consisting of all interstate motor carriers operating foreign-registered vehicles, which are subject to the identification marker requirement of Section 2102(b).

Petitioners also represent a sub-class that is certified as consisting of all interstate motor carriers operating vehicles registered in states or provinces with which Pennsylvania has entered into bilateral apportioned registration reciprocity agreements, which are subject to the identification marker requirement of Section 2102(b).

[3] A "motor carrier vehicle" is defined as "[a] truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." Section 102 of the Vehicle Code, 75 Pa. C.S. § 102.

[4] Act of June 19, 1964, P.L. 7, *as amended*, 72 P.S. §§ 2617.1-2617.26. The Road Tax is assessed against certain liquid fuels, including gasoline and diesel fuel, calculated on the amount of fuel purchased outside of, but consumed inside, Pennsylvania. Fuel purchased in Pennsylvania but consumed elsewhere is excluded. The tax rate is eleven (11) cents per gallon plus three point five percent (3.5%) of the average wholesale price of the purchased fuel.

fication marker is unlawful. Section 2102(d) of the Vehicle Code, 75 Pa.C.S. § 2102(d).

Before Section 1 of the Act of December 8, 1982, P.L. 842, No. 234 (Act 234) amended Section 2102(b) and reduced the marker fee to $5.00 (effective April 1, 1983), Sectionn 2102(b) provided:

> (b) Fee.—The fee for issuance of an identification marker shall be $25, except that for vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee.

The marker fee is a tax for the privilege of using Pennsylvania's roads. One-fifth of the tax pays the administrative costs of issuing identification markers,[5] and the balance is credited to the Motor License Fund for highway construction and maintenance, the state police and construction bond debt service. *See* J.S.F. No. 46. While operators of foreign-registered vehicles actually paid the $25.00 marker fees for 1981 and 1982 (payments which totaled approximately ten million dollars in 1981), Pennsylvania-registered motor carriers had the marker fee "deemed a part of and included in [their] vehicle registration fee[s]."

At trial petitioners asserted that the Legislature, by cleverly "deeming" the marker fee to be part of and included in the Pennsylvania registration fee, intended to —and did—impose the full tax burden on foreign-registered motor carriers while exempting Pennsylvania-registered motor carriers. Petitioners challenged the marker fee as repugnant to the United States Constitution's Commerce Clause, art. I, § 8, cl. 3; Privileges and Im-

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[5] Petitioners do not challenge the constitutionality of Section 2102(b), *as amended* by Act 234, because the $5.00 marker fees equal the stipulated costs of administering the identification marker program. *See* Joint Stipulation of Facts (J.S.F.) No. 6.

munities Clause, art. IV, § 2; Equal Protection Clause, amend. XIV; and the Uniformity Clause of the Pennsylvania Constitution, art. VIII, § 1.

Although the parties entered into an extensive factual stipulation, a trial was held regarding the validity of petitioners' survey, which purported to establish the marker fee's discriminatory impact on foreign-registered motor carriers. The Commonwealth also presented evidence relevant to truck-induced road deterioration and costs. The trial judge, after reviewing the stipulation and contemporaneous legislative history of the marker fee provision, concluded that Section 2102(b) offended the Commerce Clause by facially discriminating against foreign-registered motor carriers which, given the exemption ingeniously accorded Pennsylvania-registered motor carriers, exclusively bore the financial burden. *American Trucking Associations, Inc. v. Bloom*, 77 Pa. Commonwealth Ct. 575, 466 A.2d 755 (1983).

Respondents filed exceptions to the trial judge's decision, arguing (among other things) that Section 2102 (b) passes constitutional muster because Act 68, which created the $25.00 marker fee, also increased registration fees for Pennsylvania-based motor carrier vehicles from $45.00 to $228.00, depending on the weight classification. *See* Section 2 of Act 68 *amending* Section 1916(a) of the Vehicle Code, 75 Pa.C. § 1916(a).

Notwithstanding the vague "deemed"[6] language of Section 2102(b), the issue is whether the Legislature intended to, and actually did, incorporate the $25.00 marker fee when it increased Pennsylvania-based motor carrier vehicle registration fees under Act 68.

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[6] The verb "to deem" is defined pertinently as "to come to view, judge or classify: [h]old, [t]hink." Webster's Third New International Dictionary 589 (1966).

Our review of Act 68's contemporaneous legislative history [7] reveals a sequence of events that evince a legislative intent to exempt Pennsylvania-registered vehicles from the marker fee levy. While Act 68 increased motor carrier vehicle registration fees by amounts ranging from $45.00 to $228.00, these increments do not, and were not intended to, include the later-introduced $25.00 marker fee.

Act 68's precursor, Senate Bill No. 10 (Printer's No. 965), significantly raised motor carrier vehicle registration fees, without including a marker fee provision, when first reported from Transportation Committee on June 25, 1979. On July 10, 1979, a $5.00 identification marker decal provision was added to Senate Bill No. 10 (Printer's No. 1038). When the $25.00 marker fee was subsequently introduced in Senate Bill No. 10 (Printer's No. 1834), which was reported from Conference Committee on May 27, 1980, the motor carrier vehicle registration fees were never increased to reflect the newly added privilege tax. Moreover, the registration cost for vehicles weighing between 68,001 to 73,280 pounds was reduced by $41.00. Since the Legislature never increased registration fees in response to the subsequent $25.00 marker levy, we divine a legislative intent to exempt Pennsylvania-registered motor carriers from payment of the $25.00 marker fee.

Local taxation of interstate commerce does not violate the Commerce Clause when the levy (1) is applied to an activity with a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce and (4) is fairly related to local services. *Complete Auto Transit, Inc. v. Brady*, 430 U.S.

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[7] Section 1921(c)(7) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(c)(7), permits consideration of an act's contemporaneous legislative history when, as here, statutory language is not explicit.

274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). A state tax's validity under the Commerce Clause must be measured by the statute's actual effect on interstate commerce in the context of the state's entire, interrelated taxing scheme. *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981) (Louisiana's "first-use" tax on natural gas invalidated because local users benefited by a series of exemptions and credits).

Section 2102(b) facially offends the third prong of the *Complete Auto* standard, which proscribes discrimination against interstate commerce. Notwithstanding the Legislature's clever insertion of the "deemed" language, our review of the contemporaneous legislative history of Section 2102(b) persuades us that the Legislature intended to, and actually did, exclude Pennsylvania-registered motor carriers from the financial impact of the marker levy. "The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 335, 85 L.Ed. 275 (1940) (footnote omitted).

Since Section 2102(b) facially discriminates against foreign-registered motor carrier vehicle operators and in favor of Pennsylvania-registered motor vehicle operators in violation of the Commerce Clause, the additional exceptions need not be addressed.

Accordingly, respondents' exceptions are overruled.

CRUMLISH, Jr., President Judge, and BARRY, J., dissent.

ORDER

AND NOW, this 5th day of February, 1985 Respondents's exceptions to the Opinion and Order of Judge Robert W. Williams, Jr., dated October 17, 1983, are overruled.

APPENDIX D

COMMONWEALTH COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, SECRETARY OF
DEPARTMENT OF REVENUE,
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

Argued Dec. 11, 1984

Decided Feb. 5, 1985

Before CRUMLISH, Jr., President Judge, and ROGERS, WILLIAMS, CRAIG, MacPHAIL, DOYLE and BARRY, JJ.

WILLIAMS, Judge.

American Trucking Associations, Inc. and four foreign-based trucking companies (Petitioners) challenge the constitutionality and seek to enjoin the enforcement of Section 9902 of the Vehicle Code, 75 Pa.C.S. § 9902, which exacts a maximum, annual tax of $36.00 per axle on every motor carrier vehicle, beyond a certain weight, that travels in the Commonwealth. In this class action Petitioners also request the refunding to class members of taxes paid for tax years beginning April 1, 1983.[1] The parties have filed cross-motions for summary judgment.

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[1] This Court, on December 12, 1983, certified the represented class to consist of all interstate carriers who own foreign-registered

Section 3 of the Act of December 8, 1982, P.L. 842, No. 234 (Act 234), amended the Vehicle Code by adding a chapter entitled "Axle Tax for Highway Bridge Improvement" (Axle Tax). *See* 75 Pa.C.S. §§ 9901-09. The Axle Tax, with an effective date of April 1, 1983, imposes annually a $36.00 per axle assessment "on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds" that travels at least 2000 miles annually in Pennsylvania.[2] *See* 75 Pa.C.S. §§ 9902 and 9905. Axle Tax revenue funds highway bridge rehabilitation, replacement and removal projects, 75 Pa.C.S. § 9908, and is targeted for job-creation and the rehiring of the Commonwealth's unemployed, 75 Pa.C.S. § 9907(b).

Section 3 of Act 234 assessed a maximum tax of $36.00 per axle against both foreign-registered and Pennsylvania-registered motor carrier vehicles that travel in the Commonwealth and have a gross or registered gross weight greater than 26,000 pounds. Section 1 of Act 234, however, simultaneously amended Section 1916(a) of the Vehicle Code, 75 Pa.C.S. § 1916(a), and, beginning with the weight class upon which the Axle Tax is first imposed (*viz*, 26,001-30,000 pounds), reduced the annual, Pennsylvania truck registration fees in multiples of $36.00.

The incremental $36.00 registration fee reductions roughly correspond to the number of axles legally required for vehicles of various weights. Permissible maximum gross weights for two-axle, three-axle and four-axle

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motor carrier vehicles which are currently or prospectively subject to Section 9902 of the Vehicle Code.

Also certified was a subclass consisting of all interstate carriers who own motor carrier vehicles which are registered in non-International Registration Plan jurisdictions and which are currently or prospectively subject to Section 9902 of the Vehicle Code.

[2] Operators of motor carrier vehicles traveling less than 2000 miles per year in Pennsylvania are entitled to a rebate, which is calculated according to a statutory formula. *See* 75 Pa. C.S. § 9905.

trucks are 38,000 pounds, 58,400 pounds and 73,280 pounds, respectively. *See* 75 Pa.C.S. § 4941(c). Vehicles registered with maximum gross or combination weights of 26,001-40,000 pounds, 40,001-60,000 pounds, 60,001-73,280 pounds and 73,281-80,000 pounds, sustained registration fee reductions in amounts of $72.00, $108.00, $144.00 and $180.00, respectively. Registration fee reductions generally offset the tax owed based on the number of axles ordinarily required of vehicles within each affected weight class.[3]

While Section 3 of Act 234 assesses an Axle Tax against all designated vehicles operating in Pennsylvania, Section 1 of Act 234, by authorizing comparable registration fee reductions, negates or mitigates the financial impact of the Axle Tax on Pennsylvania-registered vehicles. Petitioners therefore argue that the combined effect of Sections 1 and 3 of Act 234, which vitiates the Axle Tax's financial effect on locally registered trucks, discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3 and the Privileges and Immunities Clause, art. IV, § 2.

Commerce Clause jurisprudence distinguishes between two types of legislation: (1) protectionist measures that are infused with discriminatory purpose or effect and (2) facially neutral acts that regulate evenhandedly to promote legitimate local interests, with incidental effects on interstate commerce. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). Economic protectionist legislation is subject to a "virtually per se rule of invalidity," while a facially neutral measure is invalidated whenever burdens on in-

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[3] The correspondence between registration fee reductions and the number of axles is not perfect. For example, trucks weighing between 38,001 and 40,000 pounds are required to have three axles, yet registration fees were reduced by $72.00 rather than $108.00.

terstate commerce clearly outweigh putative local benefits. *Id.*

The United States Supreme Court stated in *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) that

> [a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'

451 U.S. at 756, 101 S.Ct. at 2134 (quoting partially from *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 61 S.Ct. 334, 334-35, 85 L.Ed. 275 (1940).

Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977) (New York stock transfer tax scheme invalidated because it reduced tax payable by non-residents when the transfer involved an in-state sale, and also set a maximum limit to the tax payable on an in-state, but not on an out-of-state, sale.); *Maryland*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (Louisiana's "first-use" tax on natural gas invalidated because in-state purchasers favored by series of tax credits and exemptions.).

Accordingly, we grant Petitioners' motion for summary judgment and deny the Respondents' cross-motion for summary judgment.[4]

ORDER

AND NOW, this 5th day of February, 1985, Petitioner's motion for summary judgment is granted. Respondent's cross-motion for summary judgment is denied. Section 9902 of the Vehicle Code, 75 Pa.C.S. § 9902, is hereby declared to be violative of the Commerce Clause of the United States Constitution.

Refunding of Axle Tax payments for tax years beginning April 1, 1983 shall proceed in accordance with the parties' Stipulations dated February 9, 1983, February 23, 1984, and, January 16, 1985.

CRUMLISH, Jr., President Judge, and BARRY, J., dissent.

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[4] Because of our disposition of the Commerce Clause, facial discrimination issue, we need not address Petitioners' remaining arguments.

APPENDIX E

COMMONWEALTH COURT OF PENNSLYVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

Argued Dec. 11, 1984
Order Feb. 7, 1985
Opinion March 21, 1985

Before CRUMLISH, Jr., President Judge, and ROGERS, WILLIAMS, CRAIG, MacPHAIL, DOYLE and BARRY, JJ.

ORDER

Respondents' preliminary objection in the above captioned matter is hereby sustained.

OPINION

MacPHAIL, Judge.

American Trucking Associations, Inc. and two foreign-based interstate motor carriers (Petitioners) bring an original action[1] for equitable and declaratory relief, seeking a refund of taxes paid for identification markers

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[1] *See* Section 761(a)(1) of the Judicial Code, 42 Pa. C.S. § 761(a)(1).

pursuant to Section 2102(b) of the Vehicle Code, *as amended*, 75 Pa.C.S. § 2102(b) (Vehicle Code). Petitioners, on behalf of themselves and others similarly situated, demand a refund of all marker fees paid for the period between August 18, 1980 to April 1, 1982.

In a companion case, *American Trucking Associations, Inc. v. Bloom*, —— Pa. Commonwealth Ct. ——, 487 A.2d 468 (1985), this Court held that Section 2102(b) of the Vehicle Code, which required that every motor carrier vehicle [2] operating in Pennsylvania bear an identification marker, was unconstitutional because it facially discriminated against foreign motor carrier vehicles. Pursuant to Section 2102(b), operators of foreign-registered vehicles had to pay a $25.00 marker fee, while Pennsylvania-registered motor carriers had the marker fee "deemed a part of and included in the vehicle registration fee." Petitioners in that case, however, only demanded refunds of marker fees paid by class members [3] for the year beginning April 1, 1982. Since we have already decided on the constitutionality of the marker fee, the only issue before us is the refund of the marker fees paid between August 18, 1980 to April 1, 1982.

Respondents [4] have preliminarily objected, alleging that this Court does not have jurisdiction over the instant case because Petitioners did not initially seek refunds from the Board of Finance and Revenue (Board), and hence, have not exhausted their administrative remedies.

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[2] A "motor carrier vehicle" is defined as "[a] truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." Section 102 of the Vehicle Code, 75 Pa. C.S. § 102.

[3] Petitioners in that case certified a class, unlike the present action where a class has yet to be certified.

[4] Respondents include the Commonwealth's Secretary of the Department of Revenue, Attorney General and the State Police Commissioner.

We agree and will sustain Respondent's preliminary objection on this basis.

Section 503 of The Fiscal Code (Code)[5] sets forth the explicit procedures for the refunding of improperly paid taxes. Under Section 503(a) of the Code, the Board has the power to refund taxes, license fees or other moneys improperly paid to the Commonwealth. Under Section 503(a)(4) of the Code, when any tax or other money has been paid which a court of competent jurisdiction has declared to be unconstitutional, a petition for refund to the Board must be filed within five years of the payment. A decision by the Board may be appealed to this Court on a petition for review, Section 503(e) of the Code.

Petitioners argue that the doctrine of exhaustion of administrative remedies is inapplicable in this instance because 1) this Court has subject-matter jurisdiction over Petitioners' claim for refunds from the *Commonwealth* and 2) the statutory remedy is inadequate because the time, expense and delay of proceeding before the Board would be contrary to the goals of judicial economy.[6] Petitioners' first contention is without merit because as we have previously stated, Petitioners have a statutory remedy prescribed in the Code which they must follow *before*

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[5] Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. § 503.

[6] Petitioners also contend that in *American Trucking Associations, Inc. v. Bloom*, —— Pa. Commonwealth Ct. ——, 487 A.2d 468 (1985), the parties stipulated that "no affected motor carrier will be required to proceed before the Board of Finance and Revenue or otherwise come forward with any type of proof in order to be entitled to such refund" and that this stipulation binds the parties in this action to seek refunds in this Court. We need not reach the merits of this contention since the stipulation in that case is not binding on the case *sub judice*, and in any event the parties could not stipulate to facts affecting the jurisdiction of this Court. *Conyer v. Borough of Norristown*, 58 Pa. Commonwealth Ct. 629, 632, 428 A.2d 749, 751 (1981).

we can review the matter of tax refunds. Addressing Petitioners' second contention, our Supreme Court in *Shenango Valley Osteopathic v. Department of Health*, 499 Pa. 39, 48, 451 A.2d 434, 438 (1982), in clarifying its plurality opinion in *Borough of Green Tree v. Board of Property Assessments*, 459 Pa. 268, 328 A.2d 819 (1974), stated "the doctrine of exhaustion of remedies would not bar equitable intervention where there are both a substantial question of constitutionality *and* the absence of an adequate statutory remedy." In the instant case, this Court has already decided the constitutionality of the marker fees, and Petitioners are not challenging the constitutionality of the Code or the Board's power to administer the refunds.[7] Petitioners, therefore, do not have a substantial question of constitutionality to bar the exhaustion of remedies.

Petitioners argue that there are over 25,000 affected interstate motor carriers who have paid in excess of $9 million in marker fee taxes, which will inevitably cause an extreme delay in the administration of refunds. This alleged class of 25,000 interstate motor carriers has yet to be certified. Petitioners contend that this Court should decide the refund matter because it would promote judicial efficiency. We disagree. This Court has no record of how many interstate motor carriers are involved or what amount of taxes was paid by each affected motor carrier. These matters have been statutorily prescribed

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[7] Section 503(a) of The Fiscal Code, Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. § 503(a) states in pertinent part:

> The Board of Finance and Revenue shall have the power, and its duty shall be,
>
> (a) Except as hereinafter provided with respect to the Department of Transportation, to hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonuses or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled
>
> . . . .

to the Board under the Code and this Court will not prematurely interrupt this administrative process.

Our Supreme Court in *Lilian v. Commonwealth*, 467 Pa. 15, 354 A.2d 250 (1976), addressed a similar argument, when appellants there argued that the statutory remedy of obtaining sales tax refunds under the Code was inadequate because of the numerous taxpayers involved. The Supreme Court in *Lilian* stated "class status or the lack of it is irrelevant to the question whether an action is to be heard in equity or at law or whether, indeed, either form is available in light of the statutory remedy. With no independent basis for equity jurisdiction appellants cannot generate it simply by alleging a class status." *Id.* at 21, 354 A.2d at 254. Likewise, Petitioners here cannot invoke equitable jurisdiction to circumvent their administrative remedy by the mere assertion that numerous interstate motor carriers will have to pursue their refunds under the Code.

Turning now to Petitioners' request for declaratory relief, we note that under the Declaratory Judgments Act (Act), Section 7541(c)(2) of the Judicial Code, 42 Pa. C.S. § 7541(c)(2), "[r]elief shall not be available under this (Act) with respect to any: . . . (p)roceeding within the exclusive jurisdiction of a tribunal other than a court." The Board qualifies as a "tribunal other than a court." *Myers v. Department of Revenue*, 55 Pa. Commonwealth Ct. 509, 513, 423 A.2d 1101, 1103 (1980). Respondents' preliminary objection raising the issue of this Court's jurisdiction is, therefore, sustained.

CRUMLISH, Jr., President Judge, and WILLIAMS, J., dissent.

This decision was reached prior to the resignation of WILLIAMS, J.

APPENDIX F

COMMONWEALTH COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., and OLD DOMINION FREIGHT LINE, INC., and ANDERSON TRUCKING SERVICE, INC., individually and on behalf of a class of interstate motor carriers,

Petitioners,

v.

ROBERT K. BLOOM, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, and LEROY S. ZIMMERMAN, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, and DANIEL F. DUNN, COMMISSIONER OF THE STATE POLICE OF THE COMMOWEALTH OF PENNSYLVANIA,

Respondents.

Heard Sept. 19, 1983

Decided Oct. 18, 1983

WILLIAMS, Judge.

Petitioner, American Trucking Associations, Inc. and two foreign-based motor carriers,[1] challenge, in this orig-

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[1] By order of Judge MacPhail, dated May 18, 1982, Petitioners were certified as representative parties to a class action. Petitioners' class was defined as "all interstate carriers whose motor carrier vehicles are registered outside of Pennsylvania and are subject to the road tax identification marker requirement of Section 2102 of the Vehicle Code and who now are or may in the future become liable for payment of the yearly marker fee of $25.00 on account of such motor carrier vehicles."

Petitioners were also certified to represent a subclass of affected "interstate carriers whose motor carrier vehicles are registered in any of the states or provinces with which Pennsylvania has

inal action, the constitutionality of Section 2102(b) of the Vehicle Code, 75 Pa.C.S. § 2102(b), which required for years beginning the first of April 1981 and 1982, that motor carrier vehicles (vehicles)[2] operating in Pennsylvania each bear an identification marker issued by Respondent Secretary of Revenue upon payment of $25.00. Petitioners further seek the refunding of all marker decal fees paid by class members for the year beginning April 1, 1982, in accordance with the Stipulation of the parties dated February 25, 1982.

On June 18, 1980, Title 75 of the Vehicle Code was amended by Section 4 of the Act 1980-68 which added, *inter alia*, the requirement that an identification marker be affixed to every motor carrier vehicle subject to the provisions of the Motor Carriers Road Tax Act (Act).[3] Although the amendments mandate that a marker decal be provided "for every motor carrier vehicle," only foreign-registered vehicles are required to bear the marker decals since Pennsylvania-registered vehicles provide the Commonwealth notice that they are subject to the Act through their registration. Respondents' *Memorandum of Law* at 3 n. 6. Operation of a motor carrier vehicle, without an identification marker, in the Commonwealth, is unlawful. Section 2102(d) of the Vehicle Code, 75 Pa.C.S. § 2102 (d).

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entered into bilateral apportioned registration reciprocity agreements."

[2] A "motor carrier vehicle" is defined as "[a] truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." Section 102 of the Vehicle Code, *as amended*, 75 Pa.C.S. § 102.

[3] Act of June 19, 1964, P.L. 7, *as amended*, 72 P.S. §§ 2617.1-2617.26. The Motor Carriers Road Tax is a levy on certain liquid fuels, including gasoline and diesel fuel, calculated on the amount of fuel purchased outside of Pennsylvania but consumed on Commonwealth roads. Fuel purchased in Pennsylvania but consumed elsewhere is excluded. The tax rate is eleven (11) cents per gallon plus three point five percent (3.5%) of the average wholesale price of the purchased fuel.

Before Section 1 of the Act of December 8, 1982, P.L. 842, No. 234 amended Section 2102(b) of the Vehicle Code lowering the marker decal fee to $5.00 effective April 1, 1983,[4] Section 2102(b) provided:

> (b) Fee.—The fee for issuance of an identification marker shall be $25, except that for vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee.

The marker decal levy is a tax imposed for the privilege of using Pennsylvania roads. One-fifth of the tax pays the administrative costs of issuing a decal, the remainder is expended for highway maintenance and construction. Unlike the owners of foreign-registered vehicles who actually paid the $25.00 marker decal fee for 1981 and 1982 (payments totaled approximately ten million dollars in 1981), owners of Pennsylvania-registered vehicles had the marker decal fee "deemed a part of and included in [their] vehicle registration fee[s]."

Petitioners assert that the Legislature, by "deeming" the marker decal fee to be part of and included in the Pennsylvania vehicle registration fee, intended to impose the full tax burden on Petitioners and their class, and therefore exempt the owners of Pennsylvania-registered vehicles from paying the tax. Section 2102(b), Petitioners contend, is therefore unconstitutional under the Commerce Clause of the United States Constitution, Art. 1, § 8, and the Privileges and Immunities Clause, Art. IV, § 2, in that the provision facially discriminates against foreign-registered vehicles, and in favor of Pennsylvania-registered vehicles, by exempting the latter from any financial burden under the marker decal fees system.

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[4] Petitioners do not challenge the constitutionailty of Section 2101(b) *as amended*, which imposes a $5.00 marker fee, because the amount equals the stipulated cost of administering the marker decal system.

Respondents assert that since Act 1980-68 introduced the $25.00 marker decal fee *and* increased registration fees for the different weight classes of motor carrier vehicles by varying amounts, each of which exceeded the $25.00 marker fee amount, Section 2102(b) passes constitutional muster. The contemporaneous legislative history of Act 1980-68 and Respondents' consistent interpretation of the marker decal requirement as raising revenue solely from foreign-registered vehicles, however, belies this contention.

A review of the contemporaneous legislative history[5] of Act 1980-68 reveals that the Legislature did not increase registration fees so as to reflect the addition of the marker decal fee requirement. While Act 1980-68 increased motor carrier vehicle registration fees by amounts ranging from $45.00 to $228.00, those increases were not intended to include the $25.00 marker decal fee.

Senate Bill No. 10 (Printer's No. 965), the precursor of Act 1980-68, when first reported from the Transportation Committee on June 25, 1979, significantly raised registration fees without including a marker decal fee provision. When the $25.00 marker decal fee requirement was first introduced in Senate Bill No. 10 (Printer's No. 1834), as reported from Conference Committee on May 27, 1980, not only were the registration fees not increased to reflect the added marker decal fee requirement, but the registration fees for vehicles of two weight classes were actually decreased.[6] The Legislature, therefore, did not increase registration fees so as to require

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[5] Section 1921(c)(7) of the Statutory Construction Act, 1 Pa.C.S. § 1921(c)(7), permits resort to the contemporaneous legislative history of an act when, as here, the words of a statute are not explicit.

[6] The registration fees for vehicles weighing between 21,001-26,000 pounds and 68,001-73,280 pounds were decreased by $2.00 and $41.00 respectively. (*Compare* Senate Bill No. 10, Printer's Nos. 1834 and 1052.)

owners of Pennsylvania-registered vehicles to actually pay the marker decal fee.

Further, the Respondents have consistently interpreted Section 2102(b) as raising revenue *exclusively* from out-of-state carriers. By stipulation, marker decal fee revenues for the year beginning April 1, 1981, equalled $10,553,654.00. (Stipulation of Fact. No. 70,) This amount is roughly equivalent to the sum total of marker decal expenditures by Petitioners and their class for that period.

It is apparent from the contemporaneous legislative history that the Legislature intended to *exclusively* tax foreign-registered vehicles, and from the Stipulation of Facts that the Commonwealth has treated the marker decal tax receipts as coming *solely* from out-of-state carriers. Section 2102(b), therefore, facially discriminates in favor of local interests and against foreign-registered vehicles engaging in interstate commerce.

A state tax on interstate commerce does not offend the Commerce Clause of the United States Constitution, Art. 1, § 8, if that tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Section 2102(b) facially fails the third prong of the *Complete Auto* standard which prohibits discrimination against interstate commerce. Notwithstanding legislative legerdemain in the insertion of the obfuscating term "deemed," Pennsylvania-registered vehicles were *exempted* from, and foreign-registered vehicles were *subject* to, the marker decal fee. "The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 335, 85 L.Ed. 275 (1940) (footnote omitted).

Since Section 2102(b) facially discriminates against foreign-registered vehicles and in favor of Pennsylvania-registered vehicles in violation of the Commerce Clause of the United States Constitution, Petitioners' additional arguments need not be addressed.

ORDER

AND NOW, this 17th day of October, 1983, it is hereby declared that the $25.00 identification marker fee imposed upon interstate motor carrier vehicles pursuant to Section 2102(b) of the Vehicle Code, 75 Pa.C.S. § 2102 (b), violates the Commerce Clause to the United States Constitution.

Refunds of payments for identification markers for the year beginning April 1, 1982, shall proceed in accordance with the Stipulation of the parties dated February 25, 1982.

APPENDIX G

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 11 M.D. Appeal Docket 1985

Appeal from Order of the
Commonwealth Court dated
February 5, 1985 entered
in No. 315 C.D. 1982.

AMERICAN TRUCKING ASSOCIATIONS, INC.
2200 Mill Road, Alexandria, VA 22314

OLD DOMINION FREIGHT LINE, INC.
P.O. Box 2006, High Point, NC 27261

and

ANDERSON TRUCKING SERVICE, INC.
203 Cooper Avenue North, Saint Cloud, MN 56301
Individually and on behalf of a class of
interstate motor carriers similarly situated,
Petitioners-Appellees

v.

JAMES I. SCHEINER, Secretary of the Department
of Revenue of the Commonwealth of Pennsylvania
11th Floor, Strawberry Square, Harrisburg, PA 17120

LEROY S. ZIMMERMAN, Attorney General of the
Commonwealth of Pennsylvania,
16th Floor, Strawberry Square, Harrisburg, PA 17120

and

NICHOLAS G. DELLARCIPESTE, Commissioner of the
State Police of the Commonwealth of Pennsylvania
1800 Elmerton Avenue, Harrisburg, PA 17109
Respondents-Appellants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of the above-named Petitioners-Appellees hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in this action on May 6, 1986, reversing the decision and order of the Commonwealth Court of Pennsylvania granting Petitioners-Appellees judgment against Respondents-Appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865
Counsel for Petitioners-Appellees

Of Counsel:
William S. Busker
Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

cc: Commonwealth Court of Pennsylvania

APPENDIX H

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 12 M.D. Docket 1985

Appeal from Order of the
Commonwealth Court dated
February 5, 1985 entered
in No. 267 C.D. 1983.

AMERICAN TRUCKING ASSOCIATIONS, INC.
2200 Mill Road, Alexandria, VA 22314

TRI-STATE MOTOR TRANSIT COMPANY
P.O. Box 113, Joplin, MO 64802

INTERSTATE VAN LINES, INC.
5801 Rolling Road, West Springfield, VA 22152

INTERSTATE TRUCK LEASING, INC.
2700 Palmyra Road, Albany, GA 31707

and

ASTRO CONTAINER COMPANY,
A Division of Allied Drum Services, Inc.
P.O. Box 41046, Evendale, OH 45241

Individually and on behalf of a class of
interstate motor carriers similarly situated,
Petitioners-Appellees

v.

JAMES I. SCHEINER, Secretary of the Department
of Revenue of the Commonwealth of Pennsylvania
11th Floor, Strawberry Square, Harrisburg, PA 17120

LEROY S. ZIMMERMAN, Attorney General of the
Commonwealth of Pennsylvania,
16th Floor, Strawberry Square, Harrisburg, PA 17120
Respondents-Appellants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of the above-named Petitioners-Appellees hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in this action on May 6, 1986, reversing the decision and order of the Commonwealth Court of Pennsylvania granting Petitioners-Appellees judgment against Respondents-Appellants.

This appeals is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
2200 Mill Road
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(703) 838-1865
Counsel for Petitioners-Appellees

Of Counsel:
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Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

cc: Commonwealth Court of Pennsylvania

APPENDIX I

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 19 M.D. Appeal Docket 1985

Appeal from Order of the
Commonwealth Court dated
February 7, 1985 entered
in No. 160 C.D. 1984

AMERICAN TRUCKING ASSOCIATIONS, INC.
2200 Mill Road, Alexandria, VA 22314

OLD DOMINION FREIGHT LINE, INC.
P.O. Box 2006, High Point, NC 27261

and

ANDERSON TRUCKING SERVICE,
203 Cooper Avenue North, Saint Cloud, MN 56301

Individually and on behalf of a class of
interstate motor carriers similarly situated,
Respondents-Appellants

v.

JAMES I. SCHEINER, Secretary of the Department
of Revenue of the Commonwealth of Pennsylvania
11th Floor, Strawberry Square, Harrisburg, PA 17127

LEROY S. ZIMMERMAN, Attorney General of the
Commonwealth of Pennsylvania,
16th Floor, Strawberry Square, Harrisburg PA 17127

and

NICHOLAS G. DELLARCIPESTE, Commissioner of the
State Police of the Commonwealth of Pennsylvania
1800 Elmerton Avenue, Harrisburg, PA 17109
Respondents-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of the above-named Petitioners-Appellees hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in this action on May 6, 1986, affirming the decision and order of the Commonwealth Court of Pennsylvania dismissing the complaint of Petitioners-Appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
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(703) 838-1865
Counsel for Petitioners-Appellants

Of Counsel:
William S. Busker
Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

cc: Commonwealth Court of Pennsylvania

APPENDIX J

PA. CONS. STAT. ANN.

CHAPTER 21.—MOTOR CARRIERS ROAD TAX IDENTIFICATION MARKERS

* * * *

§ 2102. Identification markers required

(a) General rule.—The Secretary of Revenue shall provide an identification marker for every motor carrier vehicle.

(1) All motor vehicles required to display the identification marker shall permanently affix such identification marker on the top one-half of the outside door panel on the driver's left-hand side and shall follow the directions as indicated on the reverse side of the identification marker.

(2) The identification marker shall remain the property of the Commonwealth and may be recalled for any violation of the provisions of this chapter, the "Motor Carriers Road Tax Act" [1] or the regulations promulgated thereunder.

(b) Fee.—The fee for issuance of an identification marker prior to and including March 31, 1983 shall be $25 and thereafter the fee shall be $5. For vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee. Payment of the fee notwithstanding, no marker, permit or registration card shall be issued unless the tax imposed by section 9902 (relating to imposition of axle tax) has been paid.

(c) Issuance of markers.—Identification markers shall be issued on a 12-month basis, effective April 1 of each

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[1] 72 P.S. § 2617.1 et seq.

year, and shall be valid through the next succeeding March 31; however, enforcement of this section shall not become effective until April 15 of each year as to motor carrier vehicles displaying the previous year's identification marker.

(d) Operation without identification marker unlawful. —It shall be unlawful to operate or to cause to be operated in this Commonwealth any motor carrier vehicle unless the vehicle bears the identification marker required by this section.

(1) The Secretary of Revenue may by regulation exempt from the requirement to display the identification marker motor carrier vehicles which in his opinion are clearly identifiable such that effective enforcement of this chapter will not suffer thereby.

(2) For a period not exceeding five days as to any one motor carrier, the Secretary of Revenue by letter or telegram may authorize the operation of a motor carrier vehicle or vehicles without the identification marker required or the payment of the axle tax when the enforcement of this section or section 9902 for that period would cause undue delay and hardship in the operation of such motor carrier vehicle or vehicles:

(i) The fee for such permits shall be $25 for each motor carrier vehicle which shall be deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund.

(ii) Conditions for the issuance of such permits shall be set forth in regulations promulgated by the Department of Revenue.

1980, June 18, P.L. 229, No. 68, § 4, effective in 60 days. As amended 1982, June 23, P.L. 605, No. 171, § 8, imd. effective; 1982, Dec. 8, P.L. 842, No. 234, § 1, effective April 1, 1983.

CHAPTER 99.—AXLE TAX FOR HIGHWAY BRIDGE IMPROVEMENT

§ 9901. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Department." The Department of Revenue.

"Motor carrier." Every person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9902. Imposition of axle tax

In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of $36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the highways of this Commonwealth.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9903. Report and payment of tax

The tax shall be paid to the department at the time a motor carrier applies for vehicle registration or for the issuance of an identification marker or permit pursuant to section 2102 (relating to identification markers required). No registration card or identification marker or permit shall be issued unless the tax imposed by section 9902 (relating to imposition of axle tax) has been paid.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9904. Axle tax markers required

(a) General rule.—The Secretary of Revenue shall provide axle tax markers for each truck, truck tractor or combination upon which axle tax has been paid pursuant to section 9902 (relating to imposition of axle tax). The marker must be affixed to the vehicle and displayed as prescribed by regulation prior to the operation of the vehicle in this Commonwealth.

(b) Issuance of markers.—The axle tax marker shall be issued for a 12-month period which coincides with the period of validity of either the identification marker or registration referred to in section 9903 (relating to report and payment of tax).

(c) Penalty.—Any person who operates or causes to be operated in this Commonwealth any vehicle not displaying the axle tax marker as required by this section commits a summary offense and shall, upon conviction, be sentenced, for a first offense, to pay a fine of not less than $200 nor more than $500 and, for each subsequent or additional offense, to pay a fine of not less than $300 nor more than $500 or to imprisonment for not more than 90 days, or both.

(d) Exception.—This section shall not apply to a person operating a vehicle under a valid permit issued pursuant to section 2102(d)(2) (relating to identification markers required).

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983. As amended 1983, July 7, P.L. 32, No. 19, § 6, imd. effective.

§ 9905. Rebate in case of incidental travel

The full axle tax applies to vehicles which travel at least 2,000 miles annually in this Commonwealth. Vehicles travelling less than 2,000 miles annually may file with the department for an axle tax rebate which shall

be supported by such data as may be required by the department by regulation. The rebate will be calculated in accordance with the following formula:

$$\frac{\text{2,000—actual miles travelled}}{\text{2,000}} \text{ x axle tax paid} = \text{rebate}$$

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9906. Penalties

In addition to any penalties which may be imposed for the failure to register a vehicle or obtain and display an identification marker or special permit, any person who willfully fails to pay the tax imposed by this chapter when due commits a summary offense and, upon conviction shall be sentenced, for a first offense, to pay a fine of not less than $100 nor more than $500 and, for each subsequent or additional offense, to pay a fine of not less than $200 nor more than $500 or to undergo imprisonment for a term not exceeding 90 days or both.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9907. Deposit of proceeds and purpose of tax

(a) General rule.—Proceeds from all taxes and penalties imposed by this chapter shall be deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund, which account is hereby created.

(b) Purpose of tax.—It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth. In order to reach this goal, firms with Pennsylvania-based facilities shall be actively solicited to make bids on contracts to furnish

products and materials, including, but not limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9908. Appropriation

The funds deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund are hereby annually appropriated out of the account upon authorization by the Governor, for expenditure on bridge rehabilitation, replacement and removal projects pursuant to the act of December 8, 1982 (P.L. 848, No. 235), known as the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983," in accordance with the following priorities:

(1) The first priority is to the Treasury Department for deposit into the Capital Debt Fund for the payment of debt service on general obligation bonds of the Commonwealth which may be issued from time to time to fund any project described in the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983."

(2) The second priority is to the Department of Transportation in the event excess funds are available after the annual debt service requirements have been satisfied for:

(i) The non-Federal share of bridge rehabilitation, replacement and removal projects on State-owned bridges and bridges of undetermined ownership on State highways.

(ii) Grants to counties or municipalities to fund up to 80% of the non-Federal share of bridge rehabilitation, replacement and removal

projects on county-owned or municipal-owned bridges, and bridges of undetermined ownership on county or municipal highways. The balance of the costs of these bridge projects shall be funded by the respective county or municipality or by private funds.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9909. Administration and enforcement

(a) General rule.—The Departments of Revenue and Transportation shall jointly promulgate any regulations necessary for the proper administration and enforcement of this chapter.

(b) Appeal procedures.—The procedures for appeals relating to the tax imposed by this chapter shall be consistent with those contained in Chapter 95 (relating to oil company franchise tax for highway maintenance and construction).

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

* * * * *

SUBCHAPTER B. REGISTRATION FEES

§ 1916. Trucks and truck tractors

(a) General rule.—The annual fee for registration of a truck or truck tractor shall be determined by its registered gross weight or combination weight in pounds according to the following table:

Class	Registered Gross or Combination Weight in Pounds	Fee
1	5,000 or less	$ 39
2	5,001-7,000	54
3	7,001-9,000	102

4	9,001-11,000	132
5	11,001-14,000	162
6	14,001-17,000	192
7	17,001-21,000	237
8	21,001-26,000	270
9	26,001-30,000	243
10	30,001-33,000	306
11	33,001-36,000	342
12	36,001-40,000	366
13	40,001-44,000	357
14	44,001-48,000	393
15	48,001-52,000	444
16	52,001-56,000	480
17	56,001-60,000	558
18	60,001-64,000	597
19	64,001-68,000	633
20	68,001-73,280	690
21	73,281-76,000	885
22	76,001-78,000	909
23	78,001-78,500	921
24	78,501-79,000	933
25	79,001-80,000	945

* * * * *

As amended 1980, Feb. 15, P.L. 12, No. 8, § 1, imd. effective; 1980, June 11, P.L. 229, No. 68, § 2, effective in 60 days; 1982, Dec. 8, P.L. 842, No. 234, § 1, effective April 1, 1983.

* * * * *

1982 Amendment: Changed fees for Class 9 through Class 25 trucks and truck tractors.

SUBCHAPTER C

RECIPROCITY

Sec.

6141. Declaration of policy.

6142. Reciprocity agreements, arrangements and declarations authorized.

6143. Benefits, privileges and exemptions from taxes and fees.

6144. Vehicle registration and licensing.

6145. Proportional registration of fleet vehicles.

6146. Enforcement agreements.

6147. Declaration of reciprocity in absence of agreement.

6148. Applicability to leased vehicles.

6149. Automatic reciprocity.

6150. Proportional registration not exclusive.

6151. Suspension of reciprocity benefits.

6152. Form, publication and distribution of documents.

6153. Existing reciprocity agreements unaffected.

§ 6141. Declaration of policy

It is the policy of this Commonwealth to promote and encourage the fullest possible use of its highway system by authorizing the making and execution of reciprocal agreements, arrangments and declarations with other states, provinces, territories and countries with respect to drivers, licensed and vehicles registered in this and other states, provinces, territories and countries, thus

contributing to the economic and social development and growth of this Commonwealth.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

§ 6142. Reciprocity agreements, arrangements and declarations authorized

The secretary may execute or make agreements, arrangements and declarations to carry out the provisions of this subchapter and may amend and terminate the agreements, arrangements and declarations.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

§ 6143. Benefits, privileges and exemptions from taxes and fees

The secretary may enter into an agreement or arrangement with the duly authorized representatives of other jurisdictions, granting to drivers or vehicles or owners of vehicles properly licensed or registered in those jurisdictions, and for which evidence of compliance is supplied, benefits, privileges and exemptions from the payment, wholly or partially, of any taxes, fees or other charges imposed upon the drivers, vehicles or owners with respect to the operation or ownership of the vehicles under the laws of this Commonwealth. The agreement or arrangement shall provide that drivers or vehicles properly licensed or registered in this Commonwealth, when operating upon highways of the other jurisdiction, shall receive exemptions, benefits and privileges of a similar kind or to a similar degree as are extended to drivers or vehicles properly licensed or registered in the jurisdiction when operating in this Commonwealth. Each agreement or arrangement shall, in the judgment of the secretary, be in the best interest of this Commonwealth and the citizens thereof and shall be fair and equitable to this Commonwealth and the citizens thereof, and shall be determined on the basis and recognition of the benefits

which accrue to the economy of this Commonwealth from the uninterrupted flow of commerce.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

§ 6144. Vehicle registration and licensing

An agreement or arrangement entered into, or a declaration issued, under this subchapter may contain provisions authorizing the registration or licensing in another jurisdiction of vehicles located in or operated from a base in the other jurisdiction which vehicles otherwise would be required to be registered or licensed in this Commonwealth. In such event, the exemptions, benefits and privileges extended by the agreement or declaration shall apply to the vehicles when properly licensed or registered in the base jurisdiction.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

* * * *

§ 6147. Declaration of reciprocity in absence of agreement

In the absence of an agreement or arrangement with another jurisdiction, the secretary may examine the laws and requirements of such jurisdiction and declare the extent and nature of exemptions, benefits and privileges to be extended to vehicles properly registered or licensed in the other jurisdiction, or to the owners of the vehicles, which shall, in the judgment of the secretary, be in the best interest of this Commonwealth and the citizens thereof, and which shall be fair and equitable to this Commonwealth and the citizens thereof, and shall be determined on the basis and recognition of the benefits which accrue to the economy of this Commonwealth from the uninterrupted flow of commerce.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

* * * *

§ 6149. Automatic reciprocity

If no agreement, arrangement or declaration is in effect with respect to another jurisdiction as authorized by this subchapter, any vehicle properly registered or licensed in the other jurisdiction, and for which evidence of compliance is supplied, shall receive, when operated in this Commonwealth, the same exemptions, benefits and privileges granted by the other jurisdiction to vehicles properly registered in this Commonwealth.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

APPENDIX K

DISCRIMINATORY STATE HIGHWAY USE TAXES

STATE	STATUTORY AUTHORIZATION	DESCRIPTION	LITIGATION
1. Arkansas	1. A. Ark. Stat. Ann. § 73-1779 (Repl. 1979) B. Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (a) (3), (4), and (5) (Supp. 1985)	1. A. Retaliatory charge levied in response to Interstate Commerce Commission Authority registration fees B. Heavy vehicle use tax imposed on trucks with gvw over 73,280 pounds at $175 annually or 5¢ per mile	1. A. None B. *American Trucking Associations, Inc. ("ATA") v. Gray*, 707 S.W.2d 759 (Ark. 1986) (appeal pending) (tax found constitutional under *Aero-Mayflower* line of cases)
2. Connecticut	2. Conn. Gen. Stat. Ann. § 12-487 (West 1983)	2. $40 fuel tax decal	2. *ATA v. O'Neill*, 522 F.Supp. 49 D. Conn. 1981) (following issuance of preliminary injunction enjoining enforcement of tax, state legislature lowered fee to $10)
3. Delaware	3. Del. Code Ann. tit. 21, § 402 (1985)	3. Retaliatory tax—not currently in effect	3. None
4. Florida	4. Fla. Stat. Ann. § 207.004 (5) (d) (West Supp. 1986)	4. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	4. *Private Truck Council of America, Inc. ("PTCA") v. Florida Dept. of Revenue*, No. 85-368 (Fla. Cir. Ct., Leon Cty.)
5. Georgia	5. Ga. Code Ann. § 40-2-111 (1985)	5. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	5. *PTCA v. Georgia*, No. D15385 (Ga. Super. Ct., Fulton Cty.)
6. Illinois	6. Ill. Ann. Stat. ch. 95½, § 18-801 (Smith-Hurd 1971)	6. Retaliatory tax—not currently in effect	6. None
7. Indiana	7. A. Ind. Code Ann. § 9-7-8-1 (Burns 1980) B. Ind. Code Ann. § 6-6-8 (Burns Supp. 1986) C. Ind. Code Ann. §§ 6-1.1-8-2 and 6-1.1-8-12.5 (Burns 1984)	7. A. Retaliatory tax—not currently in effect B. $50 per truck flat highway use tax C. Indefinite-situs property tax	7. A. None B. None C. *Huie v. PTCA*, 466 N.E.2d 435 (Ind. 1984) (tax found to discriminate against interstate commerce)
8. Iowa	8. Iowa Code Ann. § 326.32 (West 1985)	8. Retaliatory tax	8. None
9. Kansas	9. Kan. Stat. Ann. § 74-4302 (1985)	9. Retaliatory tax	9. None
10. Kentucky	10. Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Baldwin Supp. 1986)	10. $150 to $200 per truck highway use tax	10. *ATA v. Kentucky*, No. 86-CI-0464 (Ky. Cir. Ct., Franklin Cty.)
11. Louisiana	11. A. La. Rev. Stat. Ann. § 47:511 (West 1970) B. La. Rev. Stat. Ann. § 45:163.1 (West Supp. 1986)	11. A. Retaliatory tax—not currently in effect B. Public Service Commission registration tax	11. A. None B. *PTCA v. Louisiana*, No. 289, 481 [2 La.] St. Tax Rep. (CCH) T 800-890 (La. D. Ct. 19th J.D., DIVH, June 20, 1986) (tax found to discriminate against interstate commerce)
12. Maine	12. A. Me. Rev. Stat. Ann. tit. 29, § 246-A (Supp. 1981) B. Me. Rev. Stat. Ann. tit. 29, § 2243 (Supp. 1985)	12. A. $40 fuel tax decal B. Retaliatory tax—imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	12. A. *ATA v. Quinn*, 437 A.2d 623 (Me. 1981) (tax found to discriminate against interstate commerce) B. *PTCA v. Secretary of State*, 503 A.2d 214 (Me.), *cert. denied*, 106 S. Ct. 1997 (1986) (tax found to discriminate against interstate commerce)
13. Maryland	13. Md. Transp. Code Ann. § 13-423(a) (1984)	13. $25 fuel tax decal	13. *ATA v. Goldstein*, 483 A.2d 47 (Md. 1984) (tax found constitutional under *Aero-Mayflower* line of cases)
14. Michigan	14. Mich. Stat. Ann. § 9.1745 (Callaghan 1981)	14. Retaliatory tax—not currently in effect	14. None
15. Minnesota	15. Minn. Stat. § 168.187 Sub. 7 (1980)	15. Retaliatory tax—imposed on trucks registered in New York and Ohio	15. None
16. Nebraska	16. Neb. Rev. Stat. § 60-305.03 (1984)	16. Retaliatory tax—imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	16. *PTCA v. Nebraska*, No. 841 (Neb. D. Ct., Lancaster Cty.)
17. New Hampshire	17. N.H. Rev. Stat. Ann. § 260:53 (1982) (repealed by Laws 1985, 383.2, effective July 1, 1985) (Supp. 1985)	17. Retaliatory tax—imposed *inter alia* in response to Pennsylvania axle tax	17. *PTCA v. New Hampshire*, No. 86-088 (Aug. 12, 1986) (tax found to discriminate against interstate commerce)
18. New Jersey	18. A. N.J. Stat. Ann. § 39:3-6 (West 1973) B. N.J. Stat. Ann. § 54:39A-10 (West Supp. 1986) C. N.J. Stat. Ann. § 48:4-2) (West Supp. 1986)	18. A. Retaliatory tax—imposed *inter alia* in response to Pennsylvania axle tax B. $25 fuel tax decal C. Bus excise tax	18. A. *PTCA v. New Jersey*, No. L875-1261 (N.J. Super. Ct., Mercer Cty., Oct. 4, 1985) (appeal pending) (tax found constitutionally permissible) B. *ATA v. Kline*, No. 07-14-1667-85 MVT (N.J. Tax Ct.) C. *Continental Trailways, Inc. v. Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986) (tax found to discriminate against interstate commerce)
19. North Carolina	19. N.C. Gen. Stat. § 20-4.4(b) (1983)	19. Retaliatory tax	19. None
20. Oklahoma	20. Okla. Stat. Ann. tit. 47, § 1120 (West Supp. 1985)	20. Retaliatory tax imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	20. *PTCA v. Oklahoma*, No. CH-84-9902 (Okla. D. Ct., Oklahoma Cty.)
21. Pennsylvania	21. A. Pa. Cons. Stat. Ann. tit. 75, § 2102 (Purdon 1981) B. Pa. Cons. Stat. Ann. tit. 75, § 9901 (Purdon Supp. 1986)	21. A. $25 fuel tax decal B. $36 per axle tax	21. A. *ATA v. Scheiner*, 509 A.2d 838 (Pa. 1986) (appeal pending) (tax found constitutional under *Aero-Mayflower* line of cases) B. *ATA v. Scheiner*, 509 A.2d 838 (Pa. 1986) (appeal pending) (tax found constitutional under compensatory tax doctrine and *Aero-Mayflower* line of cases)
22. Rhode Island	22. R.I. Gen. Laws § 31-36.1-19 (1982)	22. Retaliatory tax—not currently in effect	22. None
23. Tennessee	23. Tenn. Code Ann. § 55-4-120 (1980)	23. Retaliatory tax—not currently in effect	23. None
24. Vermont	24. A. Vt. Stat. Ann. tit. 23, §§ 415, 415(a), 417 (Supp. 1982) B. Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (Supp. 1982) C. Vt. Stat. Ann. tit. 23, § 417 (Supp. 1982) D. Vt. Stat. Ann. tit. 23, §§ 415, 3007 (Supp. 1986) E. Vt. Stat. Ann. tit. 23, § 3021 (Supp. 1985)	24. A. Entry fee tax system B. $50 fuel tax decal C. Retaliatory tax—imposed in response to weight distance taxes D. $50 fuel tax decal E. Retaliatory tax imposed in response to Pennsylvania axle tax	24. A. *ATA v. Conway*, 508 A.2d 405 (Vt. 1986) (tax found to discriminate against interstate commerce) B. *ATA v. Conway*, 508 A.2d 408 (Vt. 1986) (tax found to discriminate against interstate commerce) C. *ATA v. Conway*, No. S-95-86 WnC (Vt. Super. Ct. Washington Cty.) D. *ATA v. Conway*, No. S-147-86 WnC, [Vt.] St. Tax Rep. (CCH) T 200-263 (Vt. Super. Ct. Washington Cty., May 29, 1986) E. None
25. Virginia	25. Va. Code § 46.1-35 (Supp. 1985)	25. Retaliatory tax—not currently in effect	25. None
26. Wisconsin	26. Wis. Stat. § 341.41(3) (1982)	26. Retaliatory tax—imposed in response to weight distance taxes	26. None